

**ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**

Case Nos. 15-1110, 15-1129

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

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Healthbridge Management, LLC; 710 Long Ridge Road Operating Company II,  
LLC d/b/a Long Ridge of Stamford,  
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent,*

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On Petition For Review From a Decision And Order of  
The National Labor Relations Board

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**SUPPLEMENTAL JOINT APPENDIX**

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 01, SUBREGION 34**

**HEALTHBRIDGE MANAGEMENT, LLC;  
710 LONG RIDGE ROAD OPERATING  
COMPANY II, d/b/a LONG RIDGE OF  
STAMFORD**

**and**

**NEW ENGLAND HEALTH CARE  
EMPLOYEES UNION, DISTRICT 1199, SEIU,  
AFL-CIO**

**and**

**CARE REALTY, LLC, PARTY IN INTEREST**

**Cases    34-CA-073303  
            34-CA-080215**

**BRIEF ON BEHALF OF COUNSEL FOR THE ACTING GENERAL COUNSEL  
TO THE ADMINISTRATIVE LAW JUDGE**

**Before: Raymond P. Green, Administrative Law Judge**

**Respectfully submitted,**

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## I. SUMMARY OF THE CASE

These consolidated cases involve the termination of long-term employee and Union delegate Patrick Atkinson, and the related termination of employee Tyrone Williamson, over a ten-day span in January 2012, during a time of heightened paranoia about the Union's ability to maintain solidarity in the midst of a targeted lockout at a sister facility. Respondents in these proceedings are HealthBridge Management LLC and 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford.<sup>1</sup>

The complaint alleges and the record evidence demonstrates that employee Tyrone Williams was terminated in violation of 8(a)(3). The applicable legal analysis is *Wright Line*, and the evidence readily establishes the Acting General Counsel's prima facie case, in that: 1) Williams engaged in Union activity by enlisting Union delegate Patrick Atkinson's aid in a matter involving Williams; 2) Respondent knew of Atkinson's involvement; 3) in response to Atkinson's involvement, Respondent's Administrator specifically noted that the matter was now "out of her hands" and "Corporate" had made the decision to terminate; and 4) additional evidence of animus is inferred from Respondent's departure from past practice in deciding to terminate, evidence of disparate treatment, the pretextual nature of the proffered reason for discharge, and the contemporaneous commission of the unfair labor practice in terminating Atkinson. In response to this initial showing, Respondent failed to present evidence establishing that it would have taken the same action absent the protected involvement of Atkinson. Having failed to rebut the prima facie case, a violation of 8(a)(3) is properly found.

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<sup>1</sup> The parties entered a Joint Stipulation, a term of which was that the Acting General Counsel withdraw Care Realty and Care One, LLC as named Respondents in the Complaint, and to amend the Complaint to list Care Realty as a Party in Interest.

With respect to Atkinson's termination, the evidence readily establishes that Respondent terminated Atkinson because of protected concerted activities engaged in on January 19, 2012. The protected nature of Atkinson's conduct --- leading a group of employees into the office of the Administrator to discuss employees' concerns regarding recent disciplinary actions and other terms of employment --- is undisputed. Respondent admits that Atkinson was terminated for that conduct. Where, as here, there is no dispute that the employee was discharged for engaging in activity protected by the Act, the only question is whether the employee's conduct lost the protection of the Act, and the *Wright Line* standard does not apply. There is simply no evidence to establish that Atkinson's conduct during the "walk-in" lost the protection of the Act. In this regard, the testimony of Respondent's own witnesses corroborates the peaceful and therefore protected nature of Atkinson's conduct. Accordingly, Respondent has not and cannot rebut the Acting General Counsel's prima facie case and a violation of 8(a)(3) should be found.

## II. FACTS

### A. The Negotiating Status of the Parties in January 2012

Respondent HealthBridge Management, LLC, (Respondent HealthBridge) operates a number of long term care facilities in the state of Connecticut, including at a facility known as Long Ridge of Stamford, separately named as 710 Long Ridge Road Operating Company LLC d/b/a Long Ridge of Stamford (Respondent Long Ridge). The Respondents and the Charging Party have been engaged in protracted negotiations to reach an agreement on a successor contract, following the expiration of the most recent agreement in March of 2011 (GCX 6). In December of 2011, the intensity of the dispute

in negotiations reached an apex, as Respondent imposed a lockout at the Westport Health Care Center, one of the facilities operated by Respondent HealthBridge, then announced the lockout to the unit members at ALL of Respondents facilities in widely disseminated memos (GCX 7). As early as March 2011, Respondent had raised the possibility of utilizing a lockout at Respondent's facilities in order to gain capitulation. Actual implementation of the lockout at a single facility in December 2011 was obviously an extreme step in advancing Respondent's bargaining strategy.

It goes without saying that Respondent was heavily invested in seeing that the lockout brought about the desired result – notably, that the Union and the unit members acquiesced to Respondent's bargaining demands. Therefore, it is of little surprise that neutralizing those who could effectively garner and lead opposition to its bargaining agenda, which it believed would be hastened through imposition of the lockout, became an imperative. Patrick Atkinson, a consummate and effective Union leader, soon reminded Respondent that he presented a very real threat to the effectiveness of the lockout at the Long Ridge facility based on his ability to rally the membership.

On January 19, 2012, less than a week after Williams was suspended, Atkinson led a sizable group of employees to the office of the Administrator to protest, among other things, Williams' and other employees' unfair suspensions, and was terminated as a direct result of this protest. The fact that Atkinson was nearly a 20-year veteran who had led dozens of similar protests in the past and had a long history of advocacy as a delegate without adverse consequences begs the question of timing – why was this conduct that had not previously been objectionable to Respondent suddenly worthy of being a terminable offense? The most logical answer is Respondent's desire to

preserve the effectiveness of its lockout by quashing effective opposition leaders. While the conclusion that Williams and Atkinson's terminations were designed to protect the success of the lockout (either consciously or unconsciously) is not required to prove the General Counsel's case, it nevertheless provides the most obvious explanation for the events that occurred, and is an important element in understanding the theory of the case. In sum, it explains why, *at that particular time*, Respondent took the actions that it did.<sup>2</sup>

B. Respondents Human Resource Organizational Structure and Disciplinary Practices

In January of 2012, three members of Respondents' management team were involved in the decisions to terminate both Williams and Atkinson. These were Larry Condon, Regional Director of Operations for Respondent HealthBridge; Ed Remillard, Regional Human Resource Director for Respondent HealthBridge,<sup>3</sup> and Polly Schnell, Center Administrator for Respondent Long Ridge (Tr. 594). From December 2010 through June 2011, Condon had also functioned as the Center Administrator at Long Ridge, the position subsequently filled by Polly Schnell (Tr. 593, 594: 22).

The "Region", encompassed by Condon and Remillard's positions, covers the eight health care facilities operated by Respondent HealthBridge, in the state of Connecticut, which, as noted, includes the Long Ridge facility.<sup>4</sup> Ed Remillard "advises" each of the Center Administrators who carry out Human Resource and Labor Relations

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<sup>2</sup> It is anticipated that Respondent will point to Atkinson's long history of advocacy and lack of prior retaliation to argue that Respondent could not have been motivated by animus. However, this argument ignores the significance of the moment – an unprecedented lockout designed to pressure employees to capitulate to Respondents' bargaining demands, and the correspondingly unprecedented desire that such an extreme tactic succeed.

<sup>3</sup> Remillard described Condon as his "counterpart" in the division of Operations (Tr. 68, 5-18).

<sup>4</sup> The number of Centers within the Region fluctuated somewhat, due to closures.

functions at the facilities on how to interpret and apply the collective bargaining agreements, and the policies and procedures of the centers (Tr. 48). The expectation is that the Center Administrators will follow his advice (Tr. 48:9-25).

Where Remillard's position falls within Human Resources, Condon's position falls under "Operations". Center Administrators would report to either Remillard or Condon, "depending on the issue" (Tr. 623). With respect to disciplinary matters, Condon would be involved in both verbal warnings and terminations, whereas Remillard would only be involved in terminations or potential terminations. Discipline is routinely applied progressively, with the first step being a documented verbal warning (one-on-one education), then a written warning, suspension, and finally, termination (Tr. 205-206). Operations and the Center would not terminate someone without Human Resources approval (Tr. 625-626).<sup>5</sup> However, Operations can terminate the Center Administrators (Tr. 628, Condon; Tr. 49:1-8 Remillard).

Both Condon and Remillard testified that the goal is to have uniform enforcement of the collective bargaining agreements, as well as the policies and procedures that are in place (Tr. 50, Remillard; Tr. 659, Condon). Any time there is a suspension pending investigation, or a recommended termination, Remillard becomes involved on behalf of Respondent HealthBridge (Tr. 63: 17-25; 64:12-23; 65-66: 23-1) The investigation itself will be overseen by the Center Administrator (Tr. 79-80), who will typically email Remillard all documents collected as part of the investigation (Tr. 63: 12-24).

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<sup>5</sup> Additionally, Article 25, Section F directs that "a record of disciplinary action shall be removed from an Employee's personnel file twelve months after it was issued provided that no further disciplinary action has been recorded. During those twelve months." (GCX 6, p. 22). This article further establishes the practice of progressive discipline, as it establishes that prior discipline is removed, and therefore not relied on after a year for purposes of subsequent discipline, under the conditions specified.

Remillard's role at that stage will be to review any statements taken as part of such an investigation, then advise how it is to be handled. Where an incident occurs that could possibly result in termination, the employee will normally be suspended immediately, pending the outcome of the investigation into the alleged conduct at issue. Upon suspension, s/he is normally issued a document known as a "Suspension Pending Investigation" (GCX 8. P. 3; Tr. 64-65). Generally, the Center Administrator will obtain a statement from the person accused of misconduct at the time suspension issues (Tr. 71: 11-13; 83). Additionally, the Center Administrator will provide her own recommendation as to the appropriate course of action. (Tr. 85; GCX 8, p. 28).

In the normal course, it will only be allegations of misconduct that might lead to termination that will result in the issuance of a suspension pending investigation, and the involvement of Remillard. Not every type of misconduct will trigger a suspension pending investigation, in which case there is no need for the Regional Human Resource Department to become involved (Tr. 65, 7-23). Center Administrators receive training in the investigation process, including that employees should answer open ended questions about what they observed (Tr. 80: 5-24). When the person making the allegation of misconduct is the Center Administrator or otherwise the person that would normally conduct the investigation, typically Remillard would then assume the investigation (Tr. 70: 5-10).

Condon admitted that the practice is to do a thorough investigation with the best information available. Part of that process is to tend to document the available information (T. 635). Factors considered in assessing the gravity and appropriate discipline include whether the person involved had prior discipline against them (Tr.

631: 1-3); the location of the incident, including exposure to residents (Tr. 641: 4-6); actual physical contact between employees (Tr. 641: 7-9); vulgarity of language used (Tr. 641: 10-12); the level of disruption to operations (Tr. 641: 13-15); and the impact on residents, including their willingness to provide a statement (Tr. 641: 16-18). Schnell formerly worked as Condon's Assistant Administrator (Tr. 639). Condon could not recall whether prior to January 2012, he had directed his Center Administrators to seek input from a third party witness in deciding whether to terminate (Tr. 644: 10-15).

C. The Professional Conduct and Courtesy Policy, and the Workplace Violence Policy.

Among the policies and procedures for which Respondent seeks uniform enforcement is a Professional Conduct and Courtesy policy (GCX 11), and a "Workplace Violence Policy". The expectations and procedures under each of these policies are set forth below. A key difference in the procedures following violations of the two policies is that a violation of the Professional Conduct and Courtesy policy calls for application of progressive discipline, as it results in the employee being informed that any *continued* discourteous behavior will not be tolerated and may result in further discipline. In contrast, under the Workplace Violence policy, employees may expect to be disciplined, up to and including termination, for a single violation under the policy.

The Professional Conduct and Courtesy policy articulates Respondent's expectation that all employees be courteous and respectful to coworkers and residents. (GCX 11, p 1). It includes a non-exclusive listing of the types of behaviors that are not acceptable under the policy, such as:

- Talking loudly, yelling or screaming on HealthBridge property whether or not residents are present;

- Fighting or attempting or threatening harm to another employee or resident [also referenced is HR 3-27 on Workplace Violence for additional information];
- Refusing or failing to perform the assigned work or intentionally restricting others in their efforts to perform work;
- Rudeness or disrespect to another employee, resident or visitor;
- Insubordination, including but not limited to, failure or refusal to obey the orders or instructions of a supervisor or member of management, or the use of abusive or threatening language toward a supervisor, member of management or a resident;
- Using profane or abusive language at any time on HealthBridge property.

The policy also *specifies* a three-step procedure to be adhered to should a supervisory or non-supervisory employee observe another employee engaging in “non-courteous behavior”. First, the observing staffer is to advise the Center Administrator/Supervisor or the Regional Human Resources Department. Next, the Center Administrator will contact the allegedly discourteous employee’s supervisor and a meeting will be scheduled with the Regional Human Resources Department, the Center Administrator/Supervisor and the employee to discuss the alleged discourteous behavior and in the event the behavior is found to have been discourteous, to implement disciplinary action. The employee is to be informed that any continued discourteous behavior will not be tolerated and may result in further disciplinary action, up to and including suspension and/or termination of employment. Thus, as noted, the procedures call for adherence to the progressive discipline that is normally utilized at the facility.

Respondent also has in place a policy (HR 3-27) addressing “Workplace Violence”. The policy articulates that “[a]cts or threats of physical violence, including intimidation, harassment and/or coercion, which involve or affect HealthBridge, or which occur on HealthBridge premises or while engaged in HealthBridge business, will not be tolerated.” Under the “Procedure” section, it states (in relevant part):

1. HealthBridge expects that all employees will not engage in workplace violence or participate in activities that could lead to workplace violence.
2. Employees who engage in workplace violence or participate in activities that could lead to workplace violence may be subject to disciplinary action, up to and including suspension or termination of employment.
3. Examples of workplace violence include, but are not limited to, the following:
  - Threats or acts of violence occurring off HealthBridge premises involving someone who is acting in the capacity of a representative of HealthBridge.
  - Threats or acts of violence occurring off HealthBridge premises if HealthBridge determines that the incident may lead to an incident of violence on HealthBridge premises.
  - Threats or acts of violence resulting in the conviction of an employee or agent of HealthBridge, or of an individual performing services for the [sic] HealthBridge on a contract or temporary basis, under any criminal code provision relating to violence or threats of violence, which could adversely affect the business interests of HealthBridge.

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4. Specific examples of conduct that may be considered threats or acts of violence under this policy include, but are not limited to, the following:
  - Threatening physical or aggressive contact towards another person.
  - Threatening a person or his or her family, friends, associates or property with physical harm.
  - The intentional destruction of HealthBridge property or another's property.
  - Harassing or threatening phone calls.
  - Surveillance.
  - Stalking.
  - Veiled threats of physical harm like intimidation.
5. Employees should report any acts or threats of physical violence, including intimidation, harassment and/or coercion that involve or affect HealthBridge, or which occur on HealthBridge premises, to their Center Administrator/Supervisor or the Regional Human Resources Department.

Under the "Violations" section of the policy, it states that "Violations of this policy may result in disciplinary action, up to and including suspension, termination of employment and/or legal action as appropriate (GCX 12, p. 3). Thus, as noted, the Workplace Violence policy specifies that progressive discipline may not apply.

D. Evidence Reflecting Prior Discipline under the Professional Conduct and Workplace Violence Policies.

Documents admitted into the record reflect that prior to the terminations at issue in this proceeding, Respondent has previously investigated and disciplined employees following allegations that they engaged in violations of both the Professional Conduct and Workplace Violence policies. The various incidents are reflected in GCX 8, 14, 18, 19 and 20, and through witness testimony. Consistent with the stated directives under the policies, the evidence reflects not a single instance, before Williams, when an employee with no prior discipline was terminated following a violation of the Professional Conduct policy. A review of this evidence establishes that Respondent routinely utilizes progressive discipline in response to alleged acts of insubordination, disrespect of a supervisor or coworker, or other examples of inappropriate professional conduct. Moreover, Respondent has implemented progressive discipline even in response to violations of the Workplace Violence policy. The *only* documented example of employees who were apparently terminated without prior discipline involved acts of actual violence and physical contact. Thus, Respondent produced no examples of ever having terminated an employee in response to a single incident of discourteous behavior to a supervisor.

Employees Iris Brown and Sylvia Taylor were both involved in a violent incident that led to their termination for a first offense of Workplace Violence policy. They were initially suspended on January 13, 2011, pending investigation, and ultimately terminated three weeks later on February 4, 2011. These actions followed from a heated exchange between them, which included shoving and other physical contact, finger pointing, yelling so loud that residents' doors had to be closed, and threats of

further violence (GCX 8, p.3-4, 8; Tr. 86: 15-18). On their “suspension pending investigation” forms, under “Allegation to be Investigation” [sic], “Workplace Violence” is checked as the allegation at issue.<sup>6</sup> Their yelling and screaming was so loud that even after a nurse closed the residents’ doors, several residents reported overhearing the argument and the threats of violence (GCX 8, p. 13).

Respondent’s investigation of the incident was comprehensive, including interviewing and/or collecting statements from various third-party witnesses, i.e., residents and others not directly involved in the event (GCX 8, p. 12). More than two weeks passed between the time of the incident and a written recommendation to Remillard by then Assistant Center Administrator Polly Schnell, which accompanied a summary of the incident and investigation, that both be terminated. She wrote “what concerns me is that everyone left their work stations, argued and fought (physically) in the facility (hallway and stairwell) and many staff and residents heard it all. “ She continued “[b]oth sides were out of control, violent towards one another in the work place, and abandoned their work stations, throughout it all.” (GCX 8, p. 28). Remillard acknowledged that the impact on patients was a factor to be considered in assessing the gravity of an allegation, and the appropriate discipline (Tr. 75: 5-18; 78: 1-10). Remillard further acknowledged that actual physical contact is another factor considered in making a decision to terminate (Tr. 76-77). Condon, then the Center Administrator, directed the investigation of the incident that led to the termination of Iris Brown and Sylvia Taylor. He explained that in a case like that, where the jobs of two long-term

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<sup>6</sup> The available options include “Abuse”, “Workplace Violence”, “Performance” and “Other”, with a space for elaboration.

employees were at stake, he “did a very thorough investigation.” (Tr. 640). In this regard, he directed that statements be taken from residents and employee witnesses.

Employee Letifia Wright was initially suspended pending investigation, then terminated on September 20, 2010 for “unprofessional and inappropriate conduct”. Her termination letter reflects that she was found to have had an “inappropriate interaction with a co-worker and resident and the disrespectful attitude you have exhibited towards them.” The investigation reflected that Wright, who was working in the dietary department, had angrily responded to several phone calls from residents by yelling at them and then hanging up on them (GC 8, p. 35). Her inappropriate conduct was confirmed by statements gathered from various witnesses, including Nurse Lola Hill (Tr. 88-89).

Notably, Letifia Wright had at least two prior write ups involving similar misconduct. In June 2009, Wright received a “one-on-one counseling” after an investigation revealed that she had made a threatening call to a coworker while at work. This disciplinary action was reached after a comprehensive investigation of the allegations (GCX 20), including statements from employees not directly involved in the incident (GCX 20, pp 6-8). In December 2009, Wright received a one-day suspension for a “verbal altercation which disturbed the operation of the facility”. The write up indicates that it was a “Final Warning” (GC 20, p. 28). A heated exchange with threats of violence between Wright and a coworker had resulted in the police being called to the facility.

In August 2010, Wright was again suspended pending investigation for allegations of “inappropriate rude and threatening behavior on 8/15/10” (GCX 20, p. 38).

It is unclear from the record evidence what, if any, eventual final discipline issued following this suspension.

On January 31, 2007, Respondent issued a one-day suspension to Yvelon Saveur for what it characterized as “insubordination”. This was later reduced to a written warning for “disobedience”<sup>7</sup> (GCX 19, p. 1-2).

On February 15, 2007, Respondent issued a five-day suspension to employee Monica Gayle. Notably, this was the third disciplinary action against Gayle, as she received two prior disciplines for inappropriate professional conduct. She received a prior written warning for inappropriate professional conduct on 6/28/06, and a three-day suspension for the same offense on 12/11/06. Her five-day suspension of 2/15/2007 was deemed to be “the last step before termination.”

On November 3, 2008, Respondent issued a “one-on-one education”, for “respect and insubordination”, against employee Erik Michel. The documentation reflects that Michel told his supervisor “Don’t start with me” after the supervisor raised an issue about a parking space (GC 19, p. 6).

On December 1, 2010, employee Jennifer Baker received a three-day suspension for insubordination. When asked to perform a particular task by the Nursing Supervisor, she said “I’m not doing it!” It is unknown whether Baker had other prior discipline.

E. Patrick Atkinson’s Employment and Delegate History

Patrick Atkinson began his employment with Respondent Long Ridge in 1993 as a dietary aide and cook (Tr. 254). He served as a delegate for the workers, a position

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<sup>7</sup> The term of the most recent expired collective bargaining agreement was from December 31, 2004 to March 16, 2011 (GCX 6). As the parties have not reached a successor agreement, the terms and conditions in place at the time of expiration continue, including those established by past practice.

akin to a shop steward, for over ten years. As a delegate, he filed over 100 grievances (Tr. 255), ably represented the members in grievance meetings with management, attended arbitrations, generally advocated on behalf of the workers, and was perceived by the workers, members of management, including by Larry Condon, to be a respected leader of the workers (T. 254, 256-257, 344).

In addition to the more routine duties associated with his role, Atkinson also actively protested actions by Respondent Long View by engaging in picketing and "walk-ins" (Tr. 254). "Walk-ins" are group actions in which employees, led by a delegate, go to the office of the Center Administrator, or other manager, to protest issues of common concern in the workplace.

Very shortly after Respondent implemented the lockout at West River in December 2011, Union Vice President Paul Fortier visited the unit employees at Long Ridge to discuss the lockout. During his visit, he invited Atkinson to join him. Shortly after Atkinson met with Fortier, Schnell contacted Atkinson by phone and asked him if he had met with a Union representative that day. Upon confirming that he had, Schnell directed that he go and get that person and put him on the phone to speak with her (Tr. 258-259). As Atkinson was in the middle of lunch preparation when Schnell called, he told her he was unable to accommodate her request. Atkinson's uncontradicted testimony is that Schnell responded by demanding to know if he was "refusing to go up, get the person who [he] was on the floor with?" Atkinson told her that he was not refusing, but that he was busy and that he did not know where in the building that person was at that moment. Schnell angrily hung up on him. (Tr. 259: 15-21).

F. The Events of January 7, 2012 Involving Tyrone Williams.

On Saturday January 7, 2011, housekeeper Tyrone Williams reported as usual for his third floor housekeeping shift. Director of Social Services Kathleen Treacy was also assigned to work that Saturday, but for her the day was anything but typical. In addition to coordinating a really special discharge of long-term resident Eva Pauling, she had also been assigned to act as “Manager on Duty” of the entire facility. Treacy had been anxious that everything go smoothly for Pauling’s discharge, but unfortunately things began to get complicated when the Weekend Nurse Supervisor assisting her with the discharge raised an unwelcome query. This required that she make an unplanned phone call to contact the RN from Daniel Care, the third party agent who had done Pauline’s discharge assessment (Tr. 446-448). Things worsened for Treacy when, despite Treacy’s desire to “make a good impression” in front of Pauline’s family, Pauline’s Daniel Care’s aide spotted a cockroach walking across the counter. Treacy was horrified, fearing that someone else might see it, and immediately attempted to contact housekeeping (Tr. 448-449). Her misfortune continued, however, because in doing so she used the wrong protocol, having not known that she should have called for “third floor housekeeping” rather than simply housekeeping. So when the housekeeper from the second floor arrived, he was unwilling to assist her (Tr. 450-451). She paged again.

By the time that third floor housekeeper Tyrone Williams responded to the second page, Treacy was still tied up at the Nurses station, frantically trying to get in touch with the RN from Daniel Care, who was off that day (Tr. 452). She didn’t have the presence of mind to read Williams’ badge identifying him as housekeeping, and wrongly

assumed he was a nurse. She did notice him against the wall, but determined that he looked angry and was “huffing and puffing” and “looked really angry” (Tr. 452:20). By this time there were a number of issues vying for her attention, and she apparently abandoned her concerns about the cockroach. The patient was ready to be transported downstairs to the waiting van, and needed help with a number of bags, so she called housekeeping again, this time to seek assistance to move the bags. Unaware that the protocol required that she page “heavy housekeeping” for this type of task, she again paged for “third floor housekeeping.”

Shortly thereafter, Treacy saw Williams, this time she recalls him in an alcove down the hall. He always has his housekeeping cart nearby but for some reason she still did not recognize or understand that he was a member of the housekeeping staff, or think to ask whether he may have been there in response to her page. She reports again that he was just “staring her down” with his arms crossed. He returned to the end of the hallway where he was mopping a resident’s room, and while doing so, heard Treacy nearby telling someone that she had paged housekeeping but they had not responded. Hearing this, Williams spoke up to correct her. He then asked, in what she viewed as a rude and demanding tone, whether she had paged housekeeping, and whether she knew who he was, i.e. – that he was from housekeeping (Tr. 455-458). She responded by telling him that she thought he was a nurse. Williams found this hard to believe since he wore an ID and had his housekeeping cart just outside the door of the room.

She then asked him to help the family to take their bags down. Although this was actually a task for someone in heavy housekeeping, and not third floor housekeeping, to

which Williams was assigned, he complied. She testified that as he did so, he turned to her, while taking steps backwards and said “I’m housekeeping, sweetheart” and “don’t forget I’m housekeeping”, or words to that effect. (Tr. 458-460, Treacy; Tr. 387-396, Williams).

After putting the departing resident’s bags in the van, Williams recalled that Treacy asked to speak with him, and he followed her back into the building. As described by a witness from Daniel Care, as Williams followed her, he raised his hands in a “girly” manner, like a little dance, mocking her. Treacy’s testimony was at odds, as she described that as they re-entered the building she saw his reflection in the glass, and that he was gesturing as though he was hitting a basketball with one hand. (Tr. 463: 18-19). Once inside, Treacy told him that his behavior was inappropriate, and that he couldn’t act like that. (Tr. 463-465). She claims that he responded by pointing out that she had not known who he was, and that he entered her “physical space”. Importantly, she did not mention anything to him about his alleged actions of moving his hands behind her head as they re-entered the building, claiming that she “was afraid to even go into that with him because I didn’t know if he was going to escalate further” (Tr. 466: 1-2).

Treacy testified that she reported the incident to Williams’ direct supervisor, William Owusu (Tr. 467:15-25), and to Polly Schnell, who asked that she write a statement (GCX 9, p. 3). Her testimony establishes that the statement was written the day after the events at issue. Her statement is largely consistent with her testimony, except that there was no mention of having seen his reflection in the window to know what he was doing while walking behind her.

Also admitted into the record were statements from two Daniel Care employees, who purportedly observed what took place. (GCX 9, pp. 4-5). The statement of Elise Chiluisa describes that Williams “became rude and raised his voice to her” in response to Treacy’s admission that she had presumed he was a nurse and not there from housekeeping. Chiluisa’s statement further describes that Williams said “Well now you know, sweetheart”, and walked away. Chiluisa also observed that when Williams followed Treacy back inside the facility after helping the patients with their bags, he mocked her by “waving his hands up in the air.”

Daniel Care aide Amina Manah Trawill, also provided a written statement (GCX 9, p 5). She describes that Williams “aggressively” told Treacy that “[he] was standing right in front of her” in response to her comments to patients that no one from housekeeping had responded to her page, and that he called her “sweetheart”.

G. Respondent’s Investigation of the January 7 Incident.

The incident at issue occurred on January 7, 2011. As noted, Treacy reported it to Polly Schnell either the same day or the next, wrote a statement the next day, and submitted it to Schnell. Despite this written complaint, Williams worked as usual on Monday, January 9. (Tr. 385: 9; Tr. 396). On that day, he was approached by his supervisor, William Owusu, who asked him what had happened over the weekend with Treacy (Tr. 396: 18-24). Owusu told him that Treacy had contacted Schnell or Owusu himself, and complained that Williams was rude and disrespectful and had yelled at her and screamed at her (Tr. 398). Williams was further told that he needed to meet with Schnell. The meeting did not occur on that day, however.

The following day, January 10, 2012, Williams did not work at Long Ridge, but went in to meet with Schnell, Owusu, and Owusu's boss (Mike, last name unknown).<sup>8</sup> (Tr. 39816-25). Also present was long-term employee Tequila Watts. Watts was there as a witness for Williams, because there were no delegates available. At that meeting, despite the written complaint from Treacy, *Williams was not suspended*. Rather, Schell simply told him that she wanted to find out what was going on (Tr. 399: 15-16). Watts recalled that although Schnell explained what the accusations were, "but the way she explained it, she was making it like it wasn't a big deal." (Tr. 423). Watts recalled that the only thing that Schnell was accusing Williams of was "being rude" (Tr. 22-23). After this, Schnell told Williams that she needed him to write out a statement (Tr. 401). Watts, as an 18-year employee with more familiar with the protocol regarding discipline as well as the benefits of advocacy by Patrick Atkinson under circumstances such as these, determined that they should get Atkinson involved on Williams behalf (Tr. 410-411: 23-2).

H. Schnell's Response to Atkinson's Involvement in the Williams Incident.

On January 12, 2012, Watts told Atkinson that Schnell wanted a statement from Williams, but that he was unclear on what Atkinson was being asked to write. Atkinson responded that they should go and find out more from Schnell, so he and Watts proceeded to her office. After being invited in by Schnell, Atkinson advised her that it had come to his attention that she wanted a statement from Williams. Atkinson asked why Williams needed to write a statement and Schnell responded that she would have to ask Ed Remillard if she could give him that information. She told him she was "simply

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<sup>8</sup> Owusu's supervisor is Mike, last name not provided (Tr. 401).

doing an investigation between Tyrone and the manager.” Atkinson pointed out that if Williams was being accused of something, the Union had a right to know (Tr. 261-263). Atkinson asked what Williams was being accused of, and Schnell responded that Williams was not being accused of anything. Atkinson queried that if he is not being accused of anything, why does he need to write a statement? At that point, Schnell became irate, announcing “You know what Patrick, I’m done.” Atkinson replied that he just wanted to know what Williams was being accused of, and she said loudly, “Don’t make me tell you again, you haven’t seen me yet!” She then went to the door, opened it, and yelled, “Get out!” (Tr. 261-264; 412).

After that meeting, Atkinson contacted Williams and told him to write a statement based on what he knew. Atkinson also immediately contacted Ancy Destin, Union Organizer for the Long Ridge unit, to report what had occurred. Almost immediately thereafter, Destin contacted Schnell, to discuss Schnell’s purported offensive and irrational response to the meeting that had just occurred. Schnell told him, “Look, the only thing that I wanted to do was talk to Tyrone and wanted his side of the event, and basically, Patrick was there.” Schnell elaborated, “Well, look, right now because he got Patrick involved, it’s out of my hands. Corporate now --- is now involved and it’s not my decision to pretty much terminate.” (Tr. 346: 2-10). Destin expressed his surprise and dismay that the decision had been made to terminate Williams – at this point Williams had not even been suspended pending investigation, which is the normal course of things. Schnell repeated that the issue was “not in her hand” and that it was “in Corporate’s hand.” By Corporate, it was understood that she was referring to Ed

Remillard. Shortly thereafter, on January 16, 2012, Atkinson filed a grievance against Schnell for her actions of that day<sup>9</sup> (GCX 17).

The following day, January 13, 2012, Watts, Ria Pemberton and Williams attended a meeting in Schnell's office (Tr. 413-415). At the meeting, Schnell initially stated that Williams was being suspended pending investigation over allegations of "insubordination". Pemberton queried about the grounds for the claim of insubordination. (Tr. 3823-12). At that point, Schnell had Williams, Watts and Pemberton step out of her office, indicating that she would contact Ed Remillard to get a response to the question. They returned to the office several minutes later, at which time Schnell handed them a second paper (GCX 9, p. 3), listing the "allegations" at issue as "inappropriate interaction with a supervisor". Notably, the "Workplace Violence" box was not checked.<sup>10</sup>

Respondent's investigative file consisted of an unsigned, undated, typed statement written by Kathy Treacy complaining about Williams' conduct, and two undated statements from the two Daniel Care aides who were present at the facility on January 7, 2012. One is from Amina Mamah-Trawill. She wrote that Williams "pop up and said to her [Schnell] 'I was standing right in front of you' aggressively.'" She continued that "[t]he gentleman really took the matter real personal and started being nasty to her in front of us all. He called her "sweetheart" (GCX 9, p. 5). This statement makes no reference to any hand gestures by Williams toward Treacy.

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<sup>9</sup> The grievance alleges that on 1-12-12, "Polly Schnell was disrespectful and unprofessional toward Patrick Atkinson (Union delegate) in front of other employees and residents creating a hostile working environment and hostile living environment for the resident. "

<sup>10</sup> Remillard does not deny that he assisted Schnell in this manner. He merely could not recall (TR. 93).

The other was from Erika Chiluisa, who also testified. Chiluisa wrote that after Treacy said that she didn't know where housekeeping was, "a man named Tyson was outside the room and replied "I'm here can't you see." She described Tyson as being "rude and started raising his voice." Chiluisa's statement also described that when Williams followed Treacy into the building "I saw that he was mocking her and waving his hands up in the air." In testimony, Chiluisa further added that on the day of the incident, she advised Treacy that "you shouldn't keep your mouth shut. What he did was disrespectful and rude and basically sexual harassment. From what I've learned if you say a remark like that, sweetheart, without your, you know –how you say it? Like without your – you know, you don't want that, then that's sexual harassment." Chiluisa testified further that in following Treacy into the building, "he put up his hands and did his little mock dance." (Tr. 488).

An additional statement from William Owusu, dated January 17, 2012, was also provided.<sup>11</sup> Owusu is Williams' direct supervisor. At a grievance meeting held in March 2012 to discuss Williams' termination, Schnell admitted to the Union representatives present that Williams was a "good worker" and a "good guy". She further indicated that she could not tolerate his alleged conduct at her facility. The explanation offered for why a corrective action, short of termination, would not have been appropriate was that the conduct was so grave that it warranted skipping the normal steps of progressive

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<sup>11</sup> In this statement, Owusu states "Over a month ago I can not remember the date and time, I witness Mr. Tyrone Williams an employee of housekeeping department on the third floor unit waving his hand behind one of the department head at the third floor in front of the elevator. My Tyrone did not know I was behind him. I told him to stop and not to that kind of funny jocks [sic], I did not take it seriously because I believe he was making a jock [sic]. " It was signed by William Owusu as Director of Housekeeping. Although Respondent, by Remillard denied that this statement (GCX 15) had anything to do with the Williams' investigation, this fact is belied by the date, and the fact that it was provide to the Union in response to an information request for all of the materials Respondent collected in the investigation of Mr. Williams' behavior in the case (Tr. 196: 5-7; 245-246). The union had filed a grievance over the termination.

discipline and proceeding directly to termination (Tr. 205-206). Similarly, Condon testified that the actions of Williams warranted termination because “the behavior exhibited was really abhorrent on that day a discharge of a resident to behave that way for no apparent reason in front of staff members, towards a staff member, in front of families and, you know, outside vendors it added up that he should be terminated” (Tr. 596-97). He later added that the behavior had been “in front of residents” as well. However, there was no actual evidence that the conduct at issue had occurred in front of residents, or that this was ever a factor relied upon at the time of discipline.

Directly contradictory to its investigative procedures used in other cases, Respondent did not explain why no interviews were conducted with any of the Long Ridge employees who were present that day. The inference is therefore warranted that Respondent did not initially perceive this incident as necessitating such an extensive investigation. However, once “the fix was in” and the decision to terminate was made, it knew employees statements would not support its actions. Nor did it meaningfully explain why Respondent had not relied on any input from Williams’ day-to-day supervisor in making the determination. To the contrary, Respondent’s witnesses claimed that the statement provided to the Union from Owusu had nothing to do with its investigation.

Condon testified that he met with Schnell after the initial statements were taken. By that point, he had already determined that termination was in order, but Schnell indicated that she remained undecided. Condon testified that he directed Schnell to contact the employees of the third party agency who were present that day in order to get their perspective. He was unsure of what position these people held with their

agency, or even how long they had been employed by them (Tr. 641-646). Condon also testified that it was “in [his] opinion a no brainer to terminate him.” He cited the impact on the family, but then acknowledged that the family had not given a statement or complained. (Tr. 646-647).<sup>12</sup>

Williams did not work again. By letter from Schnell dated January 27, 2012, Respondent advised Williams that he had been terminated for “your unprofessional and inappropriate conduct, including but not limited to, your inappropriate interaction with a supervisor including derogatory verbal actions.” (RX 1). Prior to the incident of January 7, 2012, Tyrone Williams had never been disciplined for anything, and Remillard admitted that no prior discipline was considered as a factor in the decision to terminate. (Tr. 97-98).

I. The January 19, 2012 Walk-In.

On January 19, 2012, Atkinson organized a protest of unit employees, referred to as a “walk-in”. At about 3 p.m., a group of about fifteen employees met at the time clock, then proceeded to Schnell’s office. After knocking on the door, Schnell indicated that they should come in. She was at her desk working on the computer with her back to them as they entered. The employees filed in, and Patrick began speaking. He held the grievance (GCX 17) over her actions of January 12, 2012 in his hand. He said that they were there to address some concerns that they were having, that employees were being suspended unfairly, that she had not responded to his grievance, and that they had lost confidence in her leadership. (Tr. 297).

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<sup>12</sup> He explained “to put my social worker through that, that family through that, the outside agent face [sic] through that for absolutely no apparent reason it was in my opinion a no brainer to terminate him”.

At that point, Schnell looked at the number of people in the room, and commented about how many people there were. She started pointing to each of them and counting. She said something about being uncomfortable, and wanting someone else there, and got up and walked out. As she did this, someone said that they were not violent. No one blocked her path. She left for at least several minutes. After a few minutes passed, Atkinson said that it looked like she was not coming back and they should leave, so they did. As they were exiting the hallway, she was heading back towards her office with Karen the Director of Nursing. Schnell asked, "where are you going" and Atkinson told her that they were done, that there was nothing else to say, and adding "no justice, no peace" as they continued to walk away. (See Tr. 297-301). During his testimony, Atkinson tended to put the fingers of one hand into the open palm of his other hand, as a way of emphasizing his points. It was a non-violent and obviously habitual mannerism. (Tr. 300-301). He testified that he likely did something similar when he spoke to Schnell on that day.

A number of participating employees testified regarding Atkinson's conduct during the walk-in and confirm that no misconduct took place: Ria Pemberton (Tr. 532-546), Anthony Lecky (Tr. 516-532), Evelyn Rosclair (Tr. 546-552), Marie Solius (Tr. 553-561), Marie Junette Mathias (Tr. 509-515), Ruthie Taylor (Tr. 496-502). Witness Shai Restal had little recollection of anything, other than that Atkinson spoke (Tr. 504-509). None corroborated in any manner that Atkinson was in any way violent, threatening, or abusive.

Larry Condon and Ed Remillard were the only Respondent witnesses to provide testimony contradicting that of the witnesses who were present for the walk-in.

However, neither of them was in Schnell's office that day or had firsthand observations of the events at issue. Condon testified that he learned about what took place from Schnell shortly after the walk-in took place. He took no notes regarding what she told him. He claimed that he "could tell by the tone of her voice, you know, what had happened."<sup>13</sup> He explained that in listening to her description of the events, that it was a "water shed moment", that he remembered "his blood boiling" as she told him more and more about the story (Tr. 661). Inexplicably, however, he never asked Schnell to memorialize her account of the events (Tr. 663). Following his conversation with Schnell, Condon contacted Remillard and relayed secondhand what she had said to him. Remillard claims not to have taken any notes either.

On January 23, 2012, Remillard and Condon met with Schnell at Long Ridge. No notes were taken then either. They again discussed the events of January 19, 2012. Condon testified that he had Schnell "demonstrate" or "reenact" the events that occurred.

J. Atkinson's Suspension, the Subsequent Investigation and Termination

Also on January 23, 2012, Schnell, Condon and Remillard interviewed Atkinson about the events. Notes were taken of the interview with Atkinson. They reflect that in response to Condon's statement offering Atkinson an opportunity for him to tell his side, Atkinson said, "[a]s a delegate/leader I have the right to, under the NLRB, to present staff concerns to the administrator." Condon that told him that he was looking for "more details of your meeting with Polly". Atkinson told him that he had set up a meeting with the staff, that he was bringing staff concerns over the lack of confidence with the

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<sup>13</sup> At page 606: 19-23, the transcript misidentifies Ms. Howlett as the person reading FRE 803.1 .

Administrator. When Condon told him “this is a meeting to discuss your behavior”, Atkinson repeated that he had an NLRB right to bring up concerns.

According to Remillard’s notes, Condon then asked, “what did you say to Polly?”, and Atkinson responded, “I told you.” Condon asked, “did you pound your hand in your fist?” and Atkinson replied, “Polly was pointing at the members. I did not do anything inappropriate.” He then added, “at this point I am not able to give any more statement.” A brief break was taken, after which Condon advised Atkinson that he was being suspended. The “Suspension Pending Investigation” form he was given checked two boxes, the one marked “Workplace Violence” and “Other” with the notation “verbally abusive and physically threatening behavior towards administrator on Thursday 1/19/12.” Atkinson’s version of events was subsequently corroborated by all of the employees Respondent interviewed.

After that interview, Remillard and Schnell conducted interviews of employees who had participated in the “walk-in” on January 19, 2012. Respondent did not explain why they deviated from the practice of excluding a complaining manager from the interview process (Tr. 613). Even in the presence of Schnell, who had a vested interest in the investigation’s outcome, the interviewed witnesses did not corroborate Respondent’s version of what took place. Condon testified that he did not believe the witnesses who denied that Atkinson had done anything inappropriate, that “other people were covering up either reluctantly or directly for his reactions.” He did not explain why he believed that the witnesses were lying. However, Respondent’s paranoia regarding strident Union advocacy during the pendency of the lockout provides an explanation. This conclusion is nearly inescapable when one boot-straps Condon’s acknowledgment

that there had been other occasions when groups of employees had come to visit managers accompanied by a Union delegate, without incident.

Ed Remillard admitted that the reason he takes notes of interviews is because he does not have a great memory (Tr. 218). Despite this admission, he reports that he did not take a single note of anything that was said during any meetings between him, Schnell or Condon as to the events of January 19, 2012. (Tr. 221). Remillard simply asserted that in this instance he could remember the conversation unaided, but provided no explanation for why he deviated from his normal efforts to compensate for his lack of memory (Tr. 219). Remillard described that he held a meeting with Schnell to “recreate the events” that occurred on January 19, 2012. He reports that he had a paper and pen with him, but that he did not take down any notes of what occurred during that meeting.

On February 2, 2012, Atkinson was advised by letter from Polly Schnell that his 20 years of employment was being terminated. The reason provided was “your verbally abusive and physically threatening behavior toward me on January 19, 2012.” (GCX 10, p. 7).

### III. ANALYSIS

#### A. Respondent’s Termination of Tyrone Williams Violated 8(a)(3) because the AGC has Met the Burden under Wright Line, and Respondent has Failed to Rebut this by Showing that it Would have Terminated Williams in the Absence of His Protected Activity.

##### 1. The Applicable Legal Standard

Under the applicable analytical framework set forth in *Wright Line*, 251 NLRB 1083, (1980), enfd. 662 F.2d 899 (1st Cir. 1981), the General Counsel’s initial burden in 8(a)(3) discharge cases requires a showing that: (1) the employee was engaged in

protected activity; (2) the employer had knowledge of the protected activity; and (3) the employer bore animus toward the employee's protected activity. While some cases have included an additional fourth element, under which the General Counsel was obligated to prove a "nexus" or link between the employee's protected activity and the Employer's animus, the Board has recently clarified that such an element is not part of the General Counsel's initial burden. *L.M. Waste Service Corp.*, 357 NLRB No. 194, at n.7 (2011). Once the General Counsel has made this initial showing, the burden then shifts to Respondent to prove its affirmative defense that it would have taken the same action even in the absence of the employee's union activity.

Animus can be found based on direct evidence, or can be inferred from circumstantial evidence and the record as a whole. *Flour Daniel, Inc.* 304 NLRB 970 (1991). Inferences of animus and discriminatory motivation may be warranted by suspicious timing, false reasons given in defense, departures from past practices, tolerance of behavior for which the alleged discriminatee was fired, and disparate treatment of the discharged employees have all been found to support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *In-Terminal Service Corp.*, 309 NLRB 23 (1992); *Nortech Waste*, 336 NLRB 554 (2001); *Bonta Catalog Group*, 342 NLRB No. 132 (2004); *L.S.F. Transportation Inc.*, 330 NLRB 1054 (2000); and *Medic One, Inc.*, 331 NLRB 464 (2000). The Board has found the failure to investigate to be strong evidence of pretext. See *Rood Trucking Co.*, 342 NLRB 895, 899 (2004); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

Moreover, suspicious timing, along with compelling evidence of animus, strongly indicates an unlawful motivation. *Golden State Foods Corp.*, 340 NLRB 382 (2003).

To establish an affirmative defense, “[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.” *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993). The Board has determined that decisions affecting an employee's conditions of employment may be based on an employer's exercise of business judgment and that judges should not substitute their business judgment for that of an employer. *Lamar Advertising of Hartford*, 334 NLRB 261 (2004); *Yellow Ambulance Service*, 342 NLRB 804 (2004).

Moreover, the Board has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and was in fact the cause of the action. *Framan Mechanical, Inc.*, 343 NLRB 408 (2004).

2. The Evidence Readily Establishes the Elements of the AGC's Prima Facie Case. Williams Protected Activity, and Respondent's Knowledge are Undisputed, and both Direct and Circumstantial Evidence Supply the Requisite Showing of Animus.

The record amply supports a finding that Williams engaged in protected concerted activity. Patrick Atkinson was a Union delegate, and on January 12, 2012, went to the office of Polly Schnell, together with Tequila Watts, to inquire specifically on Williams' behalf. It is axiomatic that such actions were both protected concerted activities under the Act, and known to Respondent.

Direct evidence of animus is established by the uncontroverted record evidence of Ancy Destin's phone conversation with Polly Schnell on January 12, 2012. The record reflects, without contradiction that during their call, she admitted to Destin that

although she had initially wanted only to talk to Williams, but that due to Atkinson's involvement on Williams behalf, the matter was now out of her hands; Corporate had taken over, and they had made the decision to terminate. This statement represents direct evidence of animus linking Respondent's decision to implement the severe action of terminating Williams to the involvement of Union delegate Atkinson.

Additionally, the record is replete with circumstantial evidence of animus.

Schnell's announcement to Destin establishes that Respondent deviated from its normal practices in several significant ways in handling the incident. To begin, Schnell's announcement of January 12, 2012 reveals that Respondents made the decision to terminate *in advance of even suspending Williams, or obtaining his statement*. The record establishes, both by the testimony of Condon and Remillard, as well as the documentary evidence, that Respondent's normal practice is that once a complaint has been made, Respondent suspends the accused employee, pending investigation, and obtains a statement from the employee as part of that investigation at the time of the suspension. By Schnell's statements to Destin, the Employer deviated from its normal practice, making the decision to terminate prior to completing its investigation, and prior to even suspending the employee. Respondent's failure to properly investigate Williams' actions before deciding to terminate is evidence of both pretext and animus. See *Manor Care of Easton*, 356 No. 39, slip op. at 3 (2010); *Rood Trucking Co.*, 342 NLRB 895 (2004); *Golden State Foods*, 340 NLRB 382 (2003).

Moreover, the record amply demonstrates that Respondent routinely adheres to progressive discipline for violations of inappropriate professional conduct such as those alleged of Williams. Here, Respondent skipped all intervening steps in progressive

discipline to terminate a good employee for a first offense of rudeness to a clearly overwhelmed and reactionary “Acting” Manager on Duty. Thus, the record reflects that Atkinson’s involvement set off a change of events in which the only acceptable outcome for Respondent became Williams’ termination. Strong evidence of this is found in the fact that at no time prior to Atkinson’s involvement had any Respondent official behaved in a manner so as to suggest that Williams’ alleged transgression on January 7 anywhere approached being a terminable offense. In this regard, Treacy could not recall if she even made an immediate complaint regarding Williams’ alleged misconduct, Schnell did not meet with Williams until three days after the alleged misconduct, and, when she did so she exhibited no degree of urgency – as exemplified by her failure to invoke the usual practice of suspending pending investigation. That action was not triggered until three days later – after Atkinson showed up on the scene.

Moreover, there is scant evidence to justify Respondent’s extreme discipline of Williams. Treacy’s perception that Williams was “menacing”, “glaring”, “scary” and “angry”, when he reported to the Nurses station is not supported by statements from any employees who were at the nurses’ station that day.<sup>14</sup> Treacy’s perception is further belied by the reputation Williams enjoyed with both Schnell and Owusu, who saw him as a “good worker” and a “good guy”; by the lack of any prior incident or prior discipline involving Williams, and, by his soft spoken and polite manner while testifying.

Further, in light of Williams’ good reputation as a worker and with management, Condon’s admission to giving no consideration whatsoever to Treacy’s culpability in the

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<sup>14</sup> The evidence is scant that the statements from the third party witnesses had been obtained or reviewed by January 12, 2011, when the decision to terminate was made. They do not speak to Williams’ demeanor in responding to Treacy’s page and appearing at the nurses’ station. The statements are unsigned and undated, and Respondent did not elicit any evidence tending to establish that they were received and/or relied upon in advance of the termination decision.

incident further supports an inference of Respondent's unlawful motive. Treacy's obvious failings included her clear inexperience and sense of being overwhelmed by her duties, having a tendency to be fearful, assume the worst, and generally catastrophize anything that did not go according to her plan or expectation. Thus, the appearance of a roach almost put her over the edge, the need to get further corroboration from a staffer put her into a tailspin, and the appearance of an unidentified black man who had the nerve to question her and point out the obvious (that he was from housekeeping") was a threat of bodily injury causing her to fear for her safety. As she explained, amidst it all she "had to remind [her]self that [she] was the Manager on Duty" (Tr. 462:20-21). Clearly, her lack of confidence in her abilities, and her difficulty in asserting herself as a manager played a large part in converting misunderstanding into a hugely distorted event in her mind. Other failings included that, despite having paged for housekeeping and observed a facility staffer shortly thereafter, she did not speak to him to inquire if he was from housekeeping; and her reactivity in jumping to conclusions about Williams' mental and emotional state with little or no information to justify those conclusions. Williams ready willingness to be of service to the patients in need once the instructions were given is a much better indicator of his attitude than Treacy's irrational and unsupported perceptions of him.

Animus is further revealed by the transparent testimony of Respondent's witnesses in attempting to inflate the severity of Williams' conduct. At most, Williams was rude. Importantly, the record establishes that Respondent's actions respecting Williams deviated from its own written Professional Conduct and Courtesy policy, and is inordinately severe compared to similar and more egregious incidents reflected in the

record. Respondent's applicable policy regarding Professional Conduct and Courtesy is in place throughout each of the facilities that Respondent operates. (GCX 11). Where an employee engages in unprofessional or discourteous conduct, the Policy requires that the Center Administrator or Supervisor to meet with the employee to discuss the alleged behavior, and inform the employee that any *continued* discourteous behavior will not be tolerated and could result in further disciplinary action, up to and including suspension and/or termination (GCX 11, p. 3). This did not occur. Moreover, the record establishes that in prior instances of discourteous or unprofessional behavior by employees, Respondent has implemented discipline as provided for under the rule – by first issuing lesser discipline prior to termination. Respondent's efforts to elevate his actions to be as egregious as those of Iris Brown and Sylvia Taylor, the only examples of a termination for a first offense, are wholly unpersuasive. The Board has found that deviation from normal discipline practices represents animus. *Wynn Las Vegas*, 358 NLRB No. 80, at fn. 2 (July 3, 2012)(Skipping steps in progressive discipline establishes animus). *Amptech Inc.*, 342 NLRB 1131, 1135 (2004).

Finally, the Board will infer animus based on the occurrence of contemporaneous unfair labor practices. *Amptech Inc.*, 342 NLRB 1131 1135 (2004). Here, Williams was "officially" terminated by letter dated January 27, 2012 (RX 1). Only three days prior, Respondent suspended Patrick Atkinson, the very person whose involvement had triggered Respondent's exaggerated response to Williams' relatively innocuous conduct. As argued below, the record provides ample support to find that Atkinson's termination violated 8(a)(3) and (1). In terminating Atkinson, Respondent sent a powerful message undermining Atkinson's role and effectiveness as an advocate for

and leader of employees. That this intention was part of Respondent's goal is supported by Respondent's subsequent refusal to allow Atkinson to even attend any grievance meetings at the facility following his suspension.<sup>15</sup>

3. Respondent Has not Met Its Burden to Show that It Would Have Terminated Williams in the Absence of Atkinson's Protected Involvement in the Incident.

Having met its burden under *Wright Line*, Respondent has failed to rebut the Acting General Counsel's case by demonstrating that it would have terminated Williams in the absence of the protected concerted involvement of Atkinson in the incident. At best, Williams conduct was akin to that of Erik Michel, who received a "one-on-one education" after he told his supervisor "don't start with me".<sup>16</sup> The severity of the response, the deviation from the normal investigative and suspension sequence, the lack of probative input from either Owusu or Schnell, who know and work with Williams on a regular basis, and the pretextual reasons for the termination, all serve to discredit Respondent's asserted legitimate reasons for Williams' termination. Given Respondent's actions of terminating Atkinson only days later, Respondent's true motivation was a desire to effectively purge itself of the strong Union leadership of Atkinson during the critical time of the lockout when the interest of heightened employee insecurity and vulnerability came to assume particular importance.

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<sup>15</sup> Respondent insisted that a step meeting held in March 2012 to discuss a number of unresolved grievances be held offsite because it would not allow Atkinson to be on the premises.

<sup>16</sup> Although the contract between the parties had expired, Board law requires, with few exceptions not applicable here, that Respondents continue in effect the existing terms and conditions of employment, by operation of the Act. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 206-207 (1991).

A. Respondents' Termination of Patrick Atkinson Violated 8(a)(1) and(3) Because Respondent Cannot Show that His Protected Concerted Conduct Lost the Protection of the Act.

Where a respondent-employer defends a disciplinary action based on employee misconduct that is part of the *res gestae* of the employee's protected activity, the Board typically analyzes the case under the four-factor test set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979). Under this decision, the determination about whether otherwise protected activity has lost the Act's protection is based on a “careful balancing” of the following four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. 245 NLRB at 816.

Applying the factors of the *Atlantic Steel* test to the facts, Respondent's action of terminating Atkinson must be found unlawful. The actions which Respondents contend were the basis for the termination are one and the same as the protected activities, speaking to Polly Schnell about perceived unfair terms and conditions of employment. There is simply no credible evidence to establish that Atkinson engaged in any conduct during the meeting that would have caused his protected concerted “walk-in” at Schnell's office to lose the protection of the Act. Respondent's sole argument is the claim that Atkinson repeatedly pounded his fist into his hand in close proximity to Schnell. However, the *only* purported evidence of this are the hearsay statements of Condon and Remillard. For reasons never explained, Schnell did not document her observations at or near the time of the event. Additionally, Condon and Remillard's version of what they claim Schnell told them are clearly embellished, as they deviate

significantly from other versions, including those offered by Respondent's counsel.<sup>17</sup> As argued below, Schnell's statement is inadmissible. Even it were admissible, given the overwhelming weight of testimony of the numerous eyewitnesses, it would have to be discredited in light of the candid, forthright, and essentially corroborating testimony of all of the witnesses who directly observed the events at issue.

1. The Hearsay Account of What Polly Schnell told Larry Condon an Hour after the Events at Issue is Not Admissible as "Present Sense Impression" Under FRE 803.1

Federal Rule of Evidence 803.1 specifically excludes as an exception to hearsay, regardless of whether the declarant is available as a witness, "present sense impressions: a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Respondent argues that the statements made to Condon by Schnell, at about an hour after the events of January 19, 2012 qualify for this exception. Such a lapse in time negates the underlying theory of the "present sense impression" exception – which is that the "*substantial contemporaneity* of event and statement negative the likelihood of deliberate or conscious misrepresentation" See *Cumberland Farms Dairy of New York*, 258 NLRB 900, at fn. 1 (1981). Schnell's purported statements to Condon were made well after Schnell left the office, after she had gone to speak with the Director of Nursing, and after she then returned to her office and called out to the group. Indeed based on Condon's estimation of time, they appear to have been made almost an hour after the meeting. Therefore, under applicable Board precedent, the present sense impression exception is not applicable to the conversation between Schnell and Condon.

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<sup>17</sup> For instance, by their position statement dated February 27, 2012, Respondent does not make any claim, as Remillard did in testifying, that Atkinson told Schnell to "watch your back" (GCX 14, p1-2).

2. Polly Schnells's Out-of-Court Declaration is Inadmissible.

Respondent further seeks admission into the record of a declaration of Polly Schell drafted by Attorney Loveland. The declaration was prepared without any participation or input of the Acting General Counsel, the Regional Office, or the Charging Party. Schnell was served a copy of a subpoena, reflecting that she resides in Pound Ridge, New York, which is about 75 miles from the hearing location. Respondent concedes that it made no effort to seek Schnell's testimony telephonically or via videotape. Attorney Loveland made some reference to "medical reasons based on what her doctor's told her" as justification for Schnell's failure to appear (Tr. 664). However, no documentation was provided to substantiate that Schnell has a medical condition that prevented her from testifying. Attorney Loveland apparently contends that the declaration should be admitted because the trial was postponed, and if it weren't for the delay, Schnell would have testified. Yet no motion in opposition to postponement was filed citing any conflict with Schnell's schedule. Nor did Respondent seek an adjournment of the trial until such a time as Schnell might become available. Moreover, Attorney Loveland provided no legal authority in support of his contention that the declaration should be deemed admissible.

Under these circumstances, and in the absence of any circumstantial guarantee of trustworthiness, or the opportunity to cross-examine by Counsel for the Acting General Counsel, the declaration of Schnell is inadmissible hearsay, and there is no valid basis for the application of any exception.

#### IV. CONCLUSION AND REMEDY

Based on the foregoing, it is submitted that the Acting General Counsel has established by a preponderance of the evidence that Respondent violated Section 8(a)(3) and (1) of the Act in the manner described in the Complaint.

In remedy of the terminations at issue, Respondent should be ordered to cease and desist from its unlawful conduct. Respondent should further be ordered reinstate and make whole Tyrone Williams and Patrick Atkinson with compound interest for any losses they sustained because of Respondent's unlawful conduct.

The Acting General Counsel further seeks, pursuant to the Board's decision in *Latino Express*, 359 NLRB No. 44 (2012), an order requiring Respondents to reimburse Tyrone Williams and Patrick Atkinson in amounts equal to the differences in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination.

The Acting General Counsel further seeks an order, pursuant the Board's decision in *Latino Express*, 359 NLRB No. 44 (2012) that Respondents be required to submit appropriate documentation to the Social Security Administration so that when back pay is paid to Tyrone Williams and Patrick Atkinson, it will be allocated to the appropriate periods.

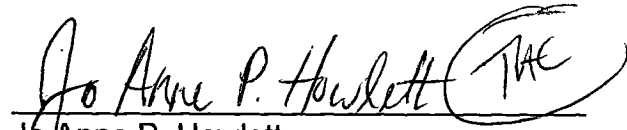
Finally, Respondent should be ordered to post an appropriate notice to employees.<sup>18</sup>

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<sup>18</sup> The Notice language should conform to the general principals set forth by the Board in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001); that is, to the extent possible, the Notice language should be comprehensible to the average employee. Attached as Appendix A is a draft of Notice language.

Dated at Hartford, Connecticut, this 19<sup>th</sup> day of September, 2013.

Respectfully submitted,

A handwritten signature in black ink, reading "Jo Anne P. Howlett". To the right of the signature is a circular stamp containing the letters "TAC".

Jo Anne P. Howlett  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 1, SubRegion 34  
Hartford, Connecticut 06103

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**APPENDIX A – PROPOSED NOTICE TO EMPLOYEES****NOTICE TO EMPLOYEES**

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice:

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

**WE WILL NOT** retaliate against you because you seek the aid of your Union Delegate or seek assistance from NEW ENGLAND HEALTHCARE EMPLOYEES UNION, DISTRICT 11199, SEIU, AFL-CIO (“your Union”).

**WE WILL NOT** retaliate against you for engaging in protected concerted activities, such as leading or participating in a “walk-in” to raise issues about your working conditions with any of our managers.

**WE WILL**, within 14 days, offer reinstatement to Tyrone Williams to his former job in housekeeping.

**WE WILL** make Williams whole for any losses he sustained as a result of our actions of suspending him on January 12, 2012 and then terminating him on January 27, 2012.

**WE WILL**, within 14 days, remove from our files any reference to Williams’ suspension and termination from employment in January 2012, and **WE WILL**, within 3 days thereafter, notify him that this has been done and that no aspect of the suspension or termination will be used against him in any way.

**WE WILL**, within 14 days, offer reinstatement to Patrick Atkinson to his former job as a dietary aide.

**WE WILL** make Atkinson whole for any losses he sustained as a result of our actions of suspending him on January 23, 2012 and then terminating him on February 2, 2012.

**WE WILL**, within 14 days, remove from our files any reference to Atkinson’s suspension and termination from employment in January of 2012, and **WE WILL**, within 3 days thereafter, notify him that this has been done and that no aspect of the suspension or termination will be used against him in any way.

SJA000046

ATTACHMENT

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 1, SUBREGION 34

HEALTHBRIDGE MANAGMENT, LLC;  
710 LONG RIDGE ROAD OPERATING  
COMPANY II, LLC D/B/A LONG RIDGE  
OF STAMFORD,

and

NEW ENGLAND HEALTH CARE  
EMPLOYEES UNION, DISTRICT 1199,  
SEIU, AFL-CIO,

CASE NOS. 34-CA-073303  
34-CA-080215

**BRIEF IN SUPPORT OF RESPONDENTS' EXCEPTIONS  
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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Company II, LLC d/b/a Long Ridge of  
Stamford**

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## I. INTRODUCTION

New England Health Care Employees Union, District 1199 SEIU, AFL-CIO (“Union”) filed unfair labor practice charges against Respondents in Case Nos. 34-CA-073303 and 34-CA-080215. The Regional Director issued the Complaint<sup>1</sup> in Case No. 34-CA-073303 on April 30, 2012, as part of a Consolidated Complaint with other unfair labor practice charges. That Complaint was further amended in a Second Amended Consolidated Complaint on July 6, 2012. On August 2, 2012, Case No. 34-CA-073303 was severed from the Second Amended Consolidated Complaint, and a separate Complaint was issued.<sup>2</sup> (GCX-1(e)).<sup>3</sup> An Order Consolidating Case No. 34-CA-080215 with Case No. 34-CA-073303 was issued on September 28, 2012, as part of the Amended Consolidated Complaint (“Complaint”), and trial was set for December 11, 2012. (GCX-1(s)). The listed respondents timely filed Answers to all Complaints. (GCX-1). On October 25, 2012, the Regional Director issued an Order Rescheduling Hearing, rescheduling the trial to an undetermined date. (GCX-1(y)). On March 12,

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<sup>1</sup> The Complaint is invalid because it was issued under the authority of the Acting General Counsel, who was not validly appointed under the Federal Vacancies Reform Act. *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 U.S. Dist. LEXIS 114320, at \*4 (W.D. Wash. 2013).

<sup>2</sup> The Order Severing Cases in Case Nos. 34-CA-070823, 072875, 073303, 075226, and 083335 that was issued by the Regional Director on August 2, 2012, was not included in the formal documents introduced by Counsel for the General Counsel at the outset of the hearing. (GCX-1; Tr. Vol. IV at 664:24–665:14). Respondents filed a Post-Trial Motion to Add the Exhibit to the Record, and by letter dated August 14, 2013, the Administrative Law Judge took official notice of the aforesaid Order Severing Cases, subject to any objection by Counsel for the General Counsel in her Post-Trial Brief. In her Post-Trial Brief to the Administrative Law Judge, Counsel for the General Counsel did not object.

<sup>3</sup> General Counsel’s Exhibits and Respondents’ Exhibits will be designated, respectively, as GCX and RX. Citations to the trial transcript will be made as (Tr. Vol. \_\_\_\_ at \_\_\_\_), and the ALJ’s decision, JD (NY)-51-13, is cited as (ALJD at \_\_\_\_).

2013, the trial was rescheduled for June 25, 2013, and was held from that date through June 28, 2013, before Administrative Law Judge Raymond P. Green (the “ALJ”). (GCX-1(aa)).

On July 25, 2013, Respondent HealthBridge Management, LLC (“HealthBridge”) and Respondent 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford (“Long Ridge” or “Center”) (collectively “Respondents”) filed two post-trial motions: Post-Trial Motion to Add Exhibit to Record (discussed above in footnote 2) and Post-Trial Motion to Implement Terms of Joint Stipulation (“Motion to Implement”) (collectively “Post-Trial Motions”). Pursuant to Respondents’ Motion to Implement, the ALJ implemented the parties’ joint stipulation and removed Care Realty, LLC and Care One LLC from the caption of the case. (ALJD at 1). Counsel for the General Counsel (“GC”) also filed a Motion for Extension of Time to File the Brief until September 19, 2013, which was granted by the Associate Chief Administrative Law Judge, and the parties filed their Briefs with the ALJ on that date.<sup>4</sup>

On November 1, 2013, the ALJ issued a Decision and Order (“Decision”) finding that former employee Patrick Atkinson (“Atkinson”) was discharged in violation of Sections 8(a)(1) and (3) of the Act. For all the reasons set forth below, the ALJ’s findings of fact and conclusions of law in that regard are contrary to the evidence and established Board law and policy. Accordingly, the ALJ’s Decision should be reversed

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<sup>4</sup> Volumes III and IV of the transcript erroneously state that John Doran appeared on behalf of Respondents. In addition, Attorney Dunlap’s name is incorrect in various places and in various different ways. Her proper name is Nicole Bermel Dunlap. The court reporter also erroneously interchanged Attorney Dunlap and Attorney Howlett’s comments in various places in the transcript. (Tr. Vol. III at 490:7–490:10; Vol. IV at 606:12–606:23).

as to his findings of fact and conclusions of law that Atkinson was unlawfully discharged. The ALJ's findings of fact and conclusions of law that Respondents did not violate Sections 8(a)(1) and (3) of the Act by terminating Tyrone Williams ("Williams") were consistent with longstanding Board precedent and should be adopted by the Board.

## II. FACTS

The Complaint alleges that Long Ridge terminated Atkinson on February 2, 2012,<sup>5</sup> because of his activities on behalf of the Union in violation of Sections 8(a)(1) and (3) of the Act. (Complaint at ¶¶ 9–11). At trial, the GC argued that Long Ridge terminated Atkinson for leading a peaceful "walk-in,"<sup>6</sup> which he admittedly did numerous times previously. (ALJD at 1). However, Atkinson was terminated because he engaged in verbally abusive and physically threatening behavior during the "walk-in," thus losing the Act's protection.

### A. Long Ridge Terminated Atkinson Because He Engaged In Verbally Abusive And Physically Threatening Behavior Toward Administrator Polly Schnell On January 19 In Violation Of The Center's Professional Conduct/Courtesy And Workplace Violence Policies.

Atkinson was a well-known, long-time Union delegate who, as a delegate, led 20 or more "walk-ins" at Long Ridge. (ALJD at 6:1–6:5; Tr. Vol. II at 301:25–302:2, 305:11–305:12). Long Ridge never complained about Atkinson's "walk-ins," and Atkinson never was disciplined as a result of those "walk-ins." (Tr. Vol. II at 303:14–

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<sup>5</sup> Unless otherwise indicated, all dates refer to those in 2012.

<sup>6</sup> The GC defined a "walk-in" as a "demonstration where a group of unit employees, led by a Union representative, approach and confront or raise issues of concern to them with Respondent[s'] management." (Tr. Vol. I at 16:6–16:10).

303:22). In the two years prior to his termination, Atkinson met with Long Ridge Administrator Polly Schnell ("Schnell") "a lot," and he conducted "walk-ins" in the office of Regional Director of Operations Larry Condon ("Condon") when Condon was the Administrator at Long Ridge. (Tr. Vol. II at 301:13–301:16; Tr. Vol. IV at 615:16–616:4). Regional Human Resources Director Ed Remillard ("Remillard") also knew that Atkinson had led "walk-ins" to the Administrator's office in the past. (Tr. Vol. I at 44:4–44:7, 105:23–106:5; 189:1–3, 189:13–189:179). It was not unusual, therefore, when Atkinson led a "walk-in" to Schnell's office on January 19. However, when Atkinson yelled at Schnell, slapped his closed fist into his other hand, and made Schnell feel so "uncomfortable" that she needed another manager present, he engaged in verbally abusive and physically threatening behavior that violated Long Ridge's Professional Conduct/Courtesy and Workplace Violence Policies<sup>7</sup> and caused him to lose any protection afforded by the Act.

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<sup>7</sup> The Professional Conduct/Courtesy Policy specifically provides that the following behaviors are unacceptable and may result in disciplinary action, up to and including termination:

- Talking loudly, yelling or screaming on [Long Ridge] property whether or not residents are present. . . .
- Rudeness or disrespect to another employee, resident or visitor. . . .
- Causing, creating or participating in the disruption of any kind during work hours or on [Long Ridge] property. . . .
- Insubordination, including but not limited to, failure or refusal to obey the orders or instructions of a supervisor or member of management, or the use of abusive or threatening language toward a supervisor, member of management or a resident.

(GCX-11 at 173). Similarly, the Workplace Violence Policy lists the following specific examples of conduct that are considered threats or acts of violence:

**1. Atkinson Engaged In Verbally Abusive And Physically Threatening Behavior When He Led A Group Of Employees Into Schnell's Office, Yelled At Schnell While He Slapped His Closed Fist Into His Other Hand, And Made Schnell Feel Uncomfortable.**

At some point before 4:00 p.m. on January 19, Schnell called and reported to Condon, her boss, that Atkinson brought a group of employees into her office to berate and threaten her.<sup>8</sup> (ALJD at 4:36–4:38; Tr. Vol. IV at 595:1–595:2, 603:17–604:10; 607:1–607:7). Condon testified that he remembered the call from Schnell quite well because “you never get a call like that;” the event was “quite disconcerting” to Schnell; and he could tell, from the tone of Schnell’s voice, that she was still very unnerved by the whole experience. (Tr. Vol. IV at 605:18–605:22). Schnell described to Condon how she was sitting at her desk when a large group of employees entered her office unannounced. (Tr. Vol. IV at 604:23–604:25). Schnell told Condon that Atkinson began berating her, stating that “people were sick and tired of her lies, that she was a cheat, and she was mismanaging, and was bad leadership in the building.” (Tr. Vol. IV at 604:25–605:3). Schnell also told Condon that because there was a large group of people surrounding her desk, she told the employees that she was uncomfortable with

- 
- Threatening physical or aggressive contact toward another person. . .
  - Veiled threats of physical harm or like intimidation.

(GCX-12 at 248).

<sup>8</sup> It is undisputed that the “walk-in” began after the 3:00 p.m. shift change, and Condon testified that Schnell talked to him about the incident before 4:00 p.m. on that day. Accordingly, contrary to the ALJ’s finding, it is undisputed that Schnell called Condon shortly after the employees left her office on January 19, not “[s]ome days after the incident.” (ALJD at 6:26; Tr. Vol. III at 493:10–493:18, 495:8–496:16, 511:4–511:8, 519:2–519:4, 533:25–534:23, 554:7–554:18; Tr. Vol. IV at 603:17–604:10; 607:1–607:9).

the situation and wanted to get another manager in the office before they continued the discussion. (Tr. Vol. IV at 605:4–605:7).

Schnell described to Condon how Atkinson made her feel even more uncomfortable as she tried to leave her office. As Schnell walked around her desk toward the door, Atkinson continued to yell at her. (Tr. Vol. IV at 605:7–605:10). Schnell stated that during this time, Atkinson pounded his fist into his hand approximately 15 to 20 times. (Tr. Vol. IV at 605:8–605:13).<sup>9</sup> Other employees told Atkinson to let Schnell go get somebody else and explained that they did not intend to be violent.<sup>10</sup> (Tr. Vol. IV at 605:13–605:18). Schnell explained to Condon that she was able to get the Director of Nursing Services, but when she returned to her office, the employees were leaving. (Tr. Vol. IV at 605:23–606:1). As the employees left, Atkinson again yelled at Schnell, telling her to “watch out.” (Tr. Vol. IV at 606:1–606:4). Condon testified that as Schnell described these events, his blood was boiling. (Tr. Vol. IV at 661:14–661:18).

Atkinson’s testimony was largely consistent with the events that Schnell described to Condon. Atkinson testified that he and approximately 15 to 20 employees went to Schnell’s office at about 3:15 p.m. on January 19. (Tr. Vol. II at 296:12–296:16,

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<sup>9</sup> At trial, Condon pounded his fist into his hand to demonstrate what Schnell told him. However, this action is not described in the trial transcript. (Tr. Vol. IV at 605:12). Nevertheless, Condon’s action was consistent with the description in the Declaration of Polly Schnell (“Schnell Declaration”) that “Atkinson kept repeating these things in the same manner and, after I got up, he **began pounding his right fist into his left hand,**” and that “[a]s I approached the door, Atkinson was about one foot from my face. He continued making the aggressive and angry statements and **pounding his fist into his hand in my face.**” (RX-10 at ¶¶ 6–7) (emphasis added).

<sup>10</sup> Schnell is five feet, five inches tall. (Tr. Vol. I at 176:16–176:17). Atkinson is six feet, two inches tall. (Tr. Vol. I at 177:4–177:8).

415:7–415:11, 416:2–416:6). After knocking, the employees filed in, and Atkinson told Schnell that the employees had lost confidence in her leadership and that they wanted to meet with corporate to address ongoing issues. (Tr. Vol. II at 296:24–297:7, 297:19–298:2, 325:18–325:20). Atkinson admitted that he was speaking loudly, so that everyone in the room could hear him. (Tr. Vol. II at 331:22–332:9). According to Atkinson, he had a copy of a grievance in his hand the entire time he was speaking, and he was slapping the back of one hand into the open palm of his other hand. (Tr. Vol. II at 297:8–298:16, 331:6–331:13, 334:3–334:5). Schnell stood up and began counting the number of employees in the office (pointing her index finger as she counted), and Atkinson stated that there was no need to count; there were 20 employees there. (Tr. Vol. II at 298:4–298:13). Atkinson admitted that Schnell told him that there were many employees in the room, that she did not want to be alone, and that she wanted to get another person from management to come into the room. (Tr. Vol. II at 299:7–299:12, 333:2–333:11). Atkinson also admitted that some employees responded to Schnell’s request to leave and get another manager. (Tr. Vol. II at 333: 19–33:25).

Atkinson denied blocking Schnell from leaving her office, explaining that Anthony Lecky (“Lecky”), another Union delegate, was standing to his left, between him and Schnell, and that Ria Pemberton (“Pemberton”), also a Union delegate, was in front of him (Atkinson). (Tr. Vol. II at 298:17–298:25). Atkinson testified that after Schnell left, the employees waited only a few seconds before leaving her office and that Schnell returned as they were doing so, asking where they were going. (Tr. Vol. II at 299:13–300:1). According to Atkinson, rather than expressing the employees’ concerns to

Schnell, Atkinson told her that they wanted to meet with corporate and “where there’s no justice, there’s no peace.” (Tr. Vol. II at 300:1–300:5).

In addition to Atkinson, eight other employees, Tequia Watts (“Watts”), Lecky, Pemberton, Ruthie Taylor (“Taylor”), Shai Restal (“Restal”), Marie Junette Matthias (“Matthias”), Evelyn Rosicclair (“Rosicclair”), and Marie Solius (“Solius”) testified about their participation in the January 19 “walk-in.” (Tr. Vol. II at 415:4–415:11; Tr. Vol. III at 492:24–493:6, 493:19–493:20, 495:2–495:7, 505:1–505:9, 510:13–510:21, 518:11–518:22, 533:24–534:8, 547:13–547:7, 553:21–554:4).<sup>11</sup> Restal recalled only that he walked into and out of Schnell’s office, that Schnell was there, that Atkinson spoke, and that there was no leader. (Tr. Vol. III at 505:14–506:1, 506:13–506:23, 507:19–507:24, 508:23–509:1).

Nearly all of the employees recalled some consistent details about the event. Thus, nearly all testified that between 13 and 20 employees went into Schnell’s office and that they met at the time clock after the first shift was over. (Tr. Vol. II at 416:5–416:6; Tr. Vol. III at 493:10–493:18, 495:8–495:16, 511:4–511:8, 515:9–515:14, 519:2–519:4, 519:23–520:1, 534:15–534:23, 547:20–548:18, 554:7–554:18). As if on cue, all of the employees testified, without being asked, that they knocked on Schnell’s office door and waited for her to say “come in” before entering. (Tr. Vol. II at 416:9–416:13; Tr. Vol. III at 496:18–496:22, 511:3, 511:13–511:16, 519:16–519:22, 535:8–535:18, 547:19, 554:25–555:7). Although Rosicclair and Solius testified that the door to Schnell’s office remained open while the employees were there, Pemberton had a specific recollection that the employees closed the door after everyone was inside and that

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<sup>11</sup> All of the additional employees except Watts were called by Long Ridge.

Schnell walked past Pemberton and opened the door to exit her office. (Tr. Vol. III at 535:8–535:18, 539:16–539:22, 550:17–550:23, 555:8–555:12). Although Pemberton testified that Atkinson did not have anything with him, Taylor and Matthias, consistent with Atkinson, testified that Atkinson had the grievance paper in his hand. (Tr. Vol. III at 499:14–499:15, 514:7–514:8, 528:2–528:3, 538:8–538:19). Lecky testified that Atkinson moved toward Schnell to hand her the grievance. (Tr. Vol. III at 528:2–528:3).

These employees generally agreed that when they walked into Schnell's office, she was behind her desk, either on the computer or the telephone, and that, at some point, Schnell got up from behind her desk, said that there were a lot of employees in her office, and began counting (with her finger) the number of employees present. (Tr. Vol. II at 416:11–416:17; Tr. Vol. III at 498:12–498:21, 501:3–501:5, 512:7–512:15, 514:11–514:12, 520:19–521:22, 526:18–526:20, 528:2–528:11, 537:22–538:10, 550:24–551:10, 554:25–555:7). Consistent with Atkinson, Watts testified that Atkinson told Schnell that she did not have to count the employees because there were 15 to 20 of them there. (Tr. Vol. II at 416:18–416:19). However, the testimony was inconsistent regarding whether Atkinson spoke in Schnell's office. Watts and Pemberton testified that Atkinson told Schnell the employees were there to present concerns and let her know that they were being treated unfairly, but Rosclair testified that Atkinson said nothing at all. (Tr. Vol. II at 416:20–417:3; Tr. Vol. III at 537:6–537:21, 538:11–538:17, 551:11–551:19, 552:15–552:16, 555:19–556:7). Taylor and Matthias did not remember whether Atkinson said anything. (Tr. Vol. III at 500:6–500:22, 514:4–514:6, 515:5–515:6). When asked if Atkinson spoke, Lecky's response was that Atkinson "did not have an argument about anything." (Tr. Vol. III at 528:19–529:1).

Although the employees could not agree about exactly where Atkinson stood in Schnell's office, the consensus was that Atkinson was in front, toward Schnell's desk, and on the side of the room closest to the door. Lecky explained that Schnell's desk was across the room from the door, slightly to the left. (Tr. Vol. III at 524:6–524:20). According to Lecky, when the employees entered the room, they formed a semi-circle around Schnell's desk, and (contrary to Atkinson's testimony that Lecky stood between him and Schnell) Atkinson was standing closer to the desk than Lecky because he wanted to give Schnell the grievance. (Tr. Vol. III at 522:5–522:17, 522:21–523:8, 527:18–527:25). Watts testified that all the employees lined up at the back of the room. (Tr. Vol. II at 416:9–416:13). Taylor testified that the employees lined up at an angle in front of Schnell's desk, and Atkinson was at the end closest to the door. (Tr. Vol. III at 497:4–497:9, 497:18–498:2, 499:6–499:13). Matthias testified that Atkinson was in the first row and was the first person in line standing on the side of the room in front of the door. (Tr. Vol. III at 513:11–514:3). Pemberton testified that she, Atkinson, and Lecky stood in the front and the other employees stood behind them on the right side of the room. (Tr. Vol. III at 535:24–537:4). Neither Rosclair nor Solius could remember where Atkinson was standing. (Tr. Vol. III at 551:24–552:4, 557:14–557:16).

It is undisputed that Schnell told the employees that she felt uncomfortable and/or frightened and wanted to get someone else from management in the office. (Tr. Vol. II at 417:7–417:11; Tr. Vol. III at 501:3–501:9, 514:11–514:12, 528:2–528:6, 537:6–537:21, 550:24–551:10, 554:25–555:7). Matthias also testified that Schnell was upset. (Tr. Vol. III at 515:8). Responding directly to Schnell, both Solius and Matthias told her that they were not there to be violent, and Pemberton told Schnell that she could go get

somebody. (Tr. Vol. II at 416:20–417:3; Tr. Vol. III at 514:13–514:21, 528:7–528:25, 541:4–541:9). The employees agreed that Schnell then left the room. (Tr. Vol. III at 528:9–528:11, 539:16–539:22, 551:20–551:21, 557:25–558:2).

Most of the employees testified that they waited about five minutes for Schnell to return before leaving. (Tr. Vol. II at 418:12–418:18; Tr. Vol. III at 557:25–558:2). Many employees testified that as they left Schnell's office, she returned with Director of Nursing Services Karen Frazier ("Frazier") and asked where the employees were going. (Tr. Vol. II at 418:18–418:20; Tr. Vol. III at 540:19–540:24, 558:9–558:15). Instead of telling Schnell what their concerns were at that time and with Frazier present, Atkinson stated that he was done there, that he had nothing else to say, and that "where there's no justice, no peace." (Tr. Vol. II at 418:20–418:21; Tr. Vol. III at 540:24–541:3, 561:5–561:12).

## **2. The Center Properly Investigated Atkinson's January 19 Conduct Toward Schnell.**

After Condon spoke with Schnell on January 19 about the "walk-in," he immediately called Remillard and told him what Schnell reported. (Tr. Vol. I at 170:23–172:25; Tr. Vol. IV at 607:23–608:7). The next day, January 20, Remillard spoke with Schnell to hear directly from her the details of the events. (Tr. Vol. I at 173:21–175:1). What Schnell told Remillard was the same as what she had told Condon the previous day (which Condon had related to Remillard). (Tr. Vol. I at 173:21–175:1; Tr. Vol. IV at 604:23–606:4). On Monday, January 23, Schnell again told Remillard and Condon what took place on January 19, this time reenacting the events as they occurred in her office. (Tr. Vol. I at 175:8–176:15; Tr. Vol. IV at 608:21–609:13). Schnell's recitation of

what occurred was the same as what she previously told Remillard and Condon. (Tr. Vol. I at 175:8–176:15; Tr. Vol. IV at 608:21–609:18).

Following Schnell's reenactment, Condon, Schnell, and Remillard met with Atkinson and Union delegate Pemberton to provide Atkinson with the opportunity to explain what occurred in Schnell's office on January 19. (Tr. Vol. I at 177:16–178:1, 178:24–179:7; Tr. Vol. IV at 609:20–610:6; GCX-10 at 2–3). Condon testified that when he asked Atkinson what happened, Atkinson responded that he was using his Union protected concerted activities. (Tr. Vol. IV at 610:7–610:16). Condon then directly asked Atkinson whether he hit his fist to his hand during that meeting. (Tr. Vol. I at 180:2–180:3; GCX-10 at 2). Atkinson did not answer the question, stating instead that the employees were bringing concerns forward, that he did not do anything inappropriate, and that, at that time, he would not give any further statement. (Tr. Vol. I at 180:3–180:7; Tr. Vol. IV at 610:16–610:20; GCX-10 at 2).

During a break in the meeting following Atkinson's comments, Condon, Schnell, and Remillard decided to suspend Atkinson pending an investigation and prepared the Suspension Notice. (Tr. Vol. I at 180:14–181:15; Tr. Vol. IV at 611:15–611:23; GCX-10 at 1–3). When the meeting resumed, Atkinson was presented with the Suspension Notice, to which the January 19 date was added; as Condon, Schnell, and Remillard were leaving, Atkinson told them to "have fun with the investigation." (Tr. Vol. I at 181:17–181:19; Tr. Vol. IV at 612:7–612:14; GCX-10 at 3). Condon responded that he did not think the investigation would be fun. (Tr. Vol. I at 181:20–181:22, GCX-10 at 3). Because neither Atkinson nor Pemberton testified about the January 23 meeting, Remillard's and Condon's testimony regarding what was said is undisputed.

After the meeting with Atkinson, Schnell and Remillard met with the employees whom Schnell recalled participating in the “walk-in,” Solius, Lecky, Matthias, Pemberton, and Rosicclair. (Tr. Vol. I at 182:1–182:7, 240:10–240:16). During the interviews, Solius and Lecky both admitted that Schnell said she was “uncomfortable.” (GCX-10 at 4). Even though no one asked him if there was any violence, Lecky volunteered that “there was no violence.” (Tr. Vol. I at 183:20–184:5; GCX-10 at 4). Although Lecky, Matthias, and Rosicclair stated that no one punched their fists, Pemberton refused to discuss that issue. (GCX-10 at 4–5). Rosicclair went so far as to tell Schnell and Remillard that everyone was silent during the “walk-in.” (GCX-10 at 4–5). Solius told Schnell and Remillard that “nothing happened and I’m part of the Union. Give me the paper and I will notify the Union.” (Tr. Vol. III at 559:12–559:22; GCX-10 at 4).

On January 30, Pemberton provided a statement, acknowledging, among other things, that Schnell told the employees she was uncomfortable and wanted to get someone else; that Schnell had to open the door to leave her office; and that when Schnell returned Atkinson told her that he was finished talking, that the employees wanted a meeting with corporate, and that “where there’s no justice, there’s no peace.” (Tr. Vol. I at 186:10–187:8; GCX-10 at 6).

After interviewing the employees, Remillard told Condon what had been said. (Tr. Vol. IV at 613:7–613:21). Condon, Remillard, and Schnell each reviewed Pemberton’s January 30 Statement after it was provided. (Tr. Vol. I at 186:10–187:8; Tr. Vol. IV at 613:22–614:5). Jointly, Condon, Schnell, and Remillard made the decision to terminate Atkinson because of his verbally abusive and physically threatening behavior toward Schnell on January 19. (Tr. Vol. I at 108:22–109:6, 187:9–188:20; Tr.

Vol. IV at 594:12–594:14, 594:23–594:25, 614:14–614:23). Condon testified that he had no choice but to terminate Atkinson to uphold Schnell's standing in the building. (Tr. Vol. IV at 614:24–614:25). Moreover, based on his telephone conversation with Schnell on January 19 and Schnell's tone and demeanor at that time, Condon had no doubt that Schnell truthfully reported what had happened. (Tr. Vol. IV at 615:4–615:10). Moreover, based on Remillard's and Schnell's interviews, Condon believed the other employees were trying to cover up for Atkinson. (Tr. Vol. IV at 615:2–615:4). Atkinson was not terminated because he was a Union delegate or because he came into Schnell's office that day with a group of employees. (Tr. Vol. I at 188:15–188:25; Tr. Vol. IV at 615:11–615:15).

**3. Schnell's Explanation Of What Occurred Remained The Same Throughout The Grievance Proceedings.**

Atkinson grieved his termination. (Tr. Vol. I at 190:18–190:24; RX-5). Condon and Schnell were present for the Step 2 grievance meeting, and Schnell again described what happened in her office on January 19, the same way she previously had told Condon. (Tr. Vol. IV at 617:15–617:21, 618:2–618:10). Condon asked Atkinson whether he had punched his fist into his hand in front of Schnell, and Atkinson said "no." (Tr. Vol. IV at 618:11–618:25). Oddly, the Union presented Pemberton's January 30 Statement as the statement of every employee who was in Schnell's office that day, even though only Pemberton signed it. (Tr. Vol. IV at 619:4–619:18).

**III. STANDARD OF REVIEW**

The Board reviews an administrative law judge's findings of fact *de novo*. *Standard Dry Wall Products, Inc.*, 9 NLRB 544, 544–45 (1950) ("in all cases which come before us for decision, we base our findings as to the facts upon a *de novo* review

of the entire record, and do not deem ourselves bound by the Trial Examiner's findings"). Thus, where an ALJ's evidentiary finding is based on facts that are clearly erroneous and contrary to the undisputed evidence in the record, the Board should review the ALJ's finding *de novo*. Although the Board generally defers to an ALJ's credibility findings because they are often based on the demeanor of witnesses at trial, even those determinations can be reversed where a clear preponderance of all relevant evidence establishes that a judge's credibility determinations are incorrect and without proper support in the record. *Russell Stover Candies Inc.*, 221 NLRB 441, 441 (1975).

The ALJ's factual finding that Schnell did not report Atkinson's conduct during the "walk-in" to Condon until "[s]ome days after the incident" is clearly erroneous and contrary to the undisputed evidence in the record. Because that finding was the basis for the ALJ's evidentiary ruling that Schnell's statements to Condon were inadmissible hearsay, that evidentiary ruling is also erroneous. The undisputed facts are that Schnell's statements to Condon were made immediately after the incident occurred. The Board, therefore, should find that those statements are admissible as substantive evidence under Federal Rule of Evidence ("Fed. R. Evid.") 803(1) as a present sense impression. Thus, Schnell's statement should be considered as part of the Board's analysis under *Atlantic Steel Co.*, 245 NLRB 814 (1979). The ALJ further erred by failing to analyze all of the *Atlantic Steel* factors and by entirely ignoring undisputed evidence regarding the nature of Atkinson's conduct. Finally, the ALJ erred by considering "background" evidence that was not in the record.

#### IV. ARGUMENT

##### A. The ALJ Improperly Considered Information That Was Not In The Record As Possible Evidence of Anti-Union Animus.

The ALJ erroneously considered “background” information in the form of several Board and ALJ decisions that he speculated to involve Respondents and/or affiliated companies. (ALJD at 2:35–3:15). The ALJ, acting *sua sponte*, erred by considering those decisions at all because they were not put into the record, were not presented at trial, and were not argued by either party in post-trial briefs. In addition, the majority of the decisions referenced by the ALJ were interim decisions not ruled upon by the Board. For both reasons, the ALJ erred by citing these decisions as “background” information that could be used as evidence of anti-union animus. (ALJD at 3:29–3:30).

First, the ALJ erroneously considered the cited decisions because they were neither offered nor admitted into the record. At trial, the only evidence introduced by the GC regarding alleged conduct other than the two discharges alleged in the Complaint was evidence that a lockout occurred at a facility other than Long Ridge, which the ALJ expressly found was not evidence of anti-union animus. (Tr. Vol. 1 at 12:19–13:21, 15:8–15:11, 59:7–60:20; ALJD at 3:17–3:27). This evidence was referenced by Counsel for the GC in her post-trial brief to the ALJ, but she did not reference any of the decisions cited by the ALJ in his Decision, nor did the GC at any time ask the ALJ to take judicial notice of these decisions. (See Brief on Behalf of the GC to the Administrative Law Judge at 2–3, n. 2, 28–35). By citing information not in the record as “background” information that could be used as evidence of anti-union animus, the ALJ clearly erred, and such error should not be adopted by the Board.

Second, the majority of the decisions referenced by the ALJ are not final decisions (including JD(NY)-01-13 issued on January 15, 2013;<sup>12</sup> an ALJ decision issued on August 1, 2012; and a case described only as “a case involving HealthBridge before still another Judge”). (ALJD at 2:42–3:15). Regarding those cases, the ALJ also erred by citing them as “background” information that could be used as evidence of anti-union animus because those decisions are pending review before the Board, and the findings therein are not binding authority. See *St. Vincent Med. Ctr.*, 338 NLRB 888 (2003) (“We decline to take judicial notice of *St. Francis Medical Center* because it is pending on review before the Board and the judge’s findings therein are not binding authority.”).

**B. Contrary To The Undisputed Evidence, The ALJ Erroneously Found That Schnell Did Not Report Atkinson’s Misconduct To Condon Immediately After The “Walk-In” And, Thus, Erred By Failing To Consider Schnell’s Statement To Condon As A Hearsay Exception Pursuant To Fed. R. Evid. 803(1).**

**1. The ALJ’s Factual Finding That Schnell Did Not Immediately Report Atkinson’s Misconduct To Condon Is Clearly Erroneous and Contrary To The Undisputed Evidence In The Record.**

It is undisputed that the “walk-in” to Schnell’s office began after the 3:00 shift change on January 19, at approximately 3:15 p.m. (Tr. Vol. II at 296:12–296:16, 415:7–415:11, 416:2–416:6; Tr. Vol. III at 493:10–493:18, 495:8–495:16, 511:4–511:8, 519:2–519:4, 533:25–534:23, 554:7–554:18). Condon’s undisputed testimony was that Schnell called him “shortly after” the “walk-in” had concluded, approximating that she called him before 4:00 p.m. on that day. (Tr. Vol. IV at 603:17–604:10; 607:1–607:9). Condon explained that he remembered the call quite well because “you never get a call

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<sup>12</sup> The ALJ erroneously cited this case as JD(NY)-012-13.

like that,” the event was “quite disconcerting” to Schnell; and he could tell, from the tone of Schnell’s voice, that she was still very unnerved by the whole experience.<sup>13</sup> (Tr. Vol. IV at 605:18–605:22).

Despite this uncontroverted evidence, the ALJ found that Schnell reported Atkinson’s conduct to Condon “[s]ome days after the incident.” (ALJD at 6:26). Not only is the ALJ’s determination contrary to the direct and undisputed testimony of Condon, but also it is contrary to the testimony of Remillard that on January 19 Condon called Remillard immediately after speaking with Schnell and told Remillard what Schnell had said. (Tr. Vol. I at 100:15–101:11, 171:1–172:25; Vol. IV at 607:23–608:7; ALJD at 4:38–4:39). Remillard also testified that he spoke to Schnell the next day, January 20, about Atkinson’s conduct on January 19. (Tr. Vol. I at 173:21–175:1).

The undisputed evidence, therefore, is that Schnell called Condon, her direct supervisor, immediately after the employees’ “walk-in” ended. Accordingly, the ALJ’s factual finding that Schnell’s statement to Condon was not made immediately after the “walk-in” is clearly erroneous and contrary to the undisputed evidence.

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<sup>13</sup> Condon also testified that his phone call with Schnell lasted approximately 5 to 10 minutes and that she described in detail the events that had just occurred. (Tr. Vol. IV at 604:4–604:10; 607:10–607:12). Condon had a very good recollection of the call, remembering where he was and what he did when he received it and remembering very specific details of what Schnell described. (Tr. Vol. IV at 604:11–604:18, 605:19–605:22). Moreover, Remillard and Condon both testified that Schnell described the events to them the same way numerous times, including when she spoke to Remillard on January 20, when she reenacted the events for Condon and Remillard in her office on January 23, and again when she repeated them at the Step 2 grievance meeting in March 2012. Furthermore, Schnell did submit a written statement in the form of the Schnell Declaration, executed under penalty of perjury on February 27 and submitted to the Region in response to the charge in 34-CA-073303. (RX-10). The Schnell Declaration recounts what occurred on January 19 the same way Condon and Remillard testified. (RX-10).

**2. Schnell's Statement To Condon Made Immediately After The "Walk-In" Regarding Atkinson's Misconduct Should Be Considered As Substantive Evidence, Admissible As A Hearsay Exception Pursuant to Fed. R. Evid.803(1).**

Schnell's statement to Condon was made immediately after the "walk-in" and, therefore, should be considered as substantive evidence of Atkinson's misconduct. Based on his erroneous factual finding that Schnell's statement to Condon<sup>14</sup> was made "[s]ome days after the incident," the ALJ determined that it did not qualify as a present sense impression. (ALJD at 6:36–6:38). However, because Schnell described the events to Condon immediately after she perceived them, what Schnell said about the January 19 "walk-in" is substantive evidence admissible as a present sense impression, an exception to the general hearsay rule articulated in Fed. R. Evid. 803(1). (FED. R. EVID 803(1); Tr. Vol. IV at 606:5–606:23). Fed. R. Evid. 803 provides that "[t]he following are not excluded by the rule against hearsay, regardless of whether the declarant is unavailable as a witness: (1) **Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." FED. R. EVID 803(1); *See Bench Book* §13.204.

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<sup>14</sup> The ALJ also analyzed whether the Schnell Declaration qualified as an exception to the hearsay rule. Respondents, however, never asserted that the Schnell Declaration should be admitted as substantive testimony pursuant to any hearsay exception. To the contrary, Respondents offered the Schnell Declaration for two purposes: (1) to show that Schnell's description of the January 19 "walk-in" was the same over time; and (2) to show that there should not be any adverse inference drawn from Schnell's failure to testify at trial because, if she had been able to testify, her testimony would have favored Respondents. (Respondents' Post-Trial Brief at n. 25; Tr. Vol. IV at 664:24–667:12). While analyzing the Schnell Declaration, the ALJ also inaccurately characterized the basis for Schnell's absence. (ALJD at 7:8–7:11). Although Respondents' subpoenaed her, Schnell, who had recently resigned her employment for health reasons, did not testify because her medical doctor advised her that she could not testify. (Tr. Vol. IV at 664:14–666:21).

In direct contradiction of Rule 803(1), the ALJ refused to consider Schnell's statement as evidence based on his concern that accepting Condon's testimony would be tantamount to receiving Schnell's unsworn and "uncross-examined" description of the January 19 events. However, all exceptions to the hearsay rule allow the admission of statements made by witnesses who are unsworn and never cross-examined. The exceptions to hearsay were created to admit those statements that were nevertheless considered to be indicative of the truth. See FED. R. EVID. 803 advisory committee's note ("[t]he underlying theory of Exception (1) is that substantial contemporaneity of event and statement negat[e] the likelihood of deliberate o[r] conscious misrepresentation"). In considering whether a statement was made "immediately thereafter" an event was perceived, Weinstein's Evidence Manual (2009) §16.02[2] explains as follows:

The statement must be made while the event or condition is being perceived by the declarant or "immediately thereafter." ***Precise contemporaneity is not always possible, and a slight lapse of time should not result in the loss of valuable evidence.*** The trial court must exercise its discretion pursuant to Rule 104(a) to decide whether the lapse of time is justified by the circumstances of a particular case, or whether it undermines the reliability of the evidence. ***The lapse may mean that the witness will not be able to corroborate the declarant's statement. . . .***

JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL, §16.02[2] (Matthew Bender 2009), (emphasis added). *Cf. Cumberland Farms Dairy of New York, Inc.*, 258 NLRB 900, n.1, 903 (1981) (failing to apply Fed. R. Evid. 803(1) to plant manager's statement that employee was terminated for abusive language made to plant

foreman ten minutes after firing employee where plant manager was angry but appeared calmer than during termination<sup>15</sup>).

Schnell's statement to Condon about what happened during the "walk-in" is a present sense impression that should be considered as substantive evidence of Atkinson's misconduct during the "walk-in." It is undisputed that Schnell called Condon "shortly after" the "walk-in" ended, and any time lapse was justified by the circumstance given that Schnell waited until her conversation with the employees was over before calling Condon. (Tr. Vol. IV at 603:17–604:10; 607:1–607:9). Likewise, Schnell's statement is reliable and indicative of the truth given Condon's testimony that when he spoke to her on the phone, he could tell from the tone of Schnell's voice that she was still very unnerved by the whole experience. (Tr. Vol. IV at 605:18–605:22). Moreover, Remillard and Condon both testified that Schnell described the events to them the same way numerous times, including when she spoke to Remillard on January 20, when she reenacted the events for Condon and Remillard in her office on January 23, and again when she repeated them at the Step 2 grievance meeting in March 2012. Most importantly, Atkinson and other Union members confirmed that most of what Schnell reported to Condon in fact occurred, including that Atkinson spoke loudly to Schnell in her office; that Atkinson held a grievance in his hand and was slapping the back of one

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<sup>15</sup> In *Cumberland Farms*, the NLRB appeared to conflate the requirements for an 803(1) exception, a present sense impression, with the 803(2) exception: "Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the **stress of excitement** that it caused." FED. R. EVID. 803(2). Arguably in this case, Schnell's statement to Condon should have been admitted into evidence under either exception since Condon testified that when he spoke to Schnell after the walk-in he could tell, from the tone of Schnell's voice that she was still very unnerved by the whole experience. (Tr. Vol. IV at 605:18–605:22).

hand into the open palm of his other hand;<sup>16</sup> and that Schnell told the employees that she felt uncomfortable and/or frightened as a result of what was happening and wanted to get someone else from management. (Tr. Vol. II at 331:22–332:9, 297:8–298:16, 331:6–331:13, 334:3–334:5, 417:7–417:11; Tr. Vol. III at 501:3–501:9; 514:11–514:12, 528:2–528:6, 537:6–537:21, 550:24–551:10, 554:25–555:7). It is also undisputed that during the investigation, Condon directly asked Atkinson if he hit his fist into his hand, and Atkinson did not answer the question. (Tr. Vol. I at 180:3–180:7; Tr. Vol. IV at 610:16–610:20; GCX-10 at 2). Likewise, Union delegate Pemberton refused to discuss whether Atkinson punched his hand into his fist during the “walk-in.”<sup>17</sup> (GCX-10 at 4). All of these factors demonstrate that Schnell’s statement to Condon is indicative of the truth and should be admitted as a present sense impression, should be considered as substantive evidence, and should be weighed accordingly.

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<sup>16</sup> The only fact that Schnell reported to Condon that is not corroborated by the testimony of Atkinson and the other Union members is Schnell’s description to Condon that she perceived Atkinson’s hand motions (which he admitted making) as Atkinson pounding his fist into his hand. (See Tr. Vol. IV at 605:8–605:13). Given Atkinson’s admission that he was holding the grievance in one hand while he was slapping the back of one hand into the open palm of his other hand, Schnell’s description of the events is, nevertheless, consistent with Atkinson’s testimony on this point. (Tr. Vol. II at 297:8–297:18).

<sup>17</sup> Notwithstanding Pemberton’s refusal to discuss the issue on January 19, William Owusu, the Director of Housekeeping at Long Ridge, testified that Pemberton and Lecky told him that during the “walk-in,” Atkinson was hitting the back of his right hand into his left hand. (Tr. Vol. III at 567:2–569:13).

**C. The ALJ's Finding That Under *Atlantic Steel*, Atkinson Did Not Lose Protection Under The Act Is Contrary To The Evidence And Established Board Law Because Atkinson's Conduct Was Verbally Abusive And Physically Threatening.**

The ALJ's analysis of Atkinson's conduct during the "walk-in" was totally flawed under *Atlantic Steel Co.*, 245 NLRB 814 (1979).<sup>18</sup> First, and as explained above, the ALJ should have considered Schnell's statements to Condon as substantive evidence of Atkinson's misconduct. Second, the ALJ should have analyzed all of the *Atlantic Steel* factors, not simply ending his inquiry after determining (incorrectly, as detailed below) that "there [was] no evidence that Atkinson's conduct involved any threats, menacing conduct, or any attempt to impede Schnell from leaving her office."<sup>19</sup> (ALJD at 7:13–7:36). Finally, and as described below, the ALJ should have considered the undisputed testimony of Atkinson and other Union members that indicated that Atkinson acted in a threatening manner, specifically that during the "walk-in," Schnell told the employees that she felt uncomfortable with the events that were taking place in her office. (Tr. Vol. II at 417:7–417:11; Tr. Vol. III at 501:3–501:9, 514:11–514:12, 528:2–528:6, 537:6–537:21, 550:24–551:10, 554:25–555:7). Considering all of the testimony and analyzing

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<sup>18</sup> In determining whether an employee has lost the Act's protection, the Board balances the following four factors:

- (1) the place of the discussion between the employee and the employer;
- (2) the subject matter of the discussion;
- (3) the nature of the employee's outburst; and
- (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice

*Tru Joist MacMillan*, 341 NLRB 369, 370 (2004) (citing *Atlantic Steel Co.*, 245 NLRB at 814).

<sup>19</sup> The only *Atlantic Steel* factor considered by the ALJ was the nature of the employee's outburst. (ALJD at 7:31–7:36).

all four *Atlantic Steel* factors, the ALJ should have found that Atkinson's conduct during the "walk-in" caused him to lose the protection of the Act because three of the four *Atlantic Steel* factors weigh strongly against protection of that conduct, and the fourth factor appears to be neutral.

**1. The Location Of The "Walk-in" Weighs Against Protection.**

"The location of an employee's conduct weighs against protection when the employee engages in insubordinate or profane conduct toward a supervisor in front of other employees, regardless of whether those employees are on or off duty. The question is whether there is a likelihood that other employees were exposed to the misconduct." *Starbucks Corp.*, 354 NLRB 876, 878 (2009), *abrogated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). In this case, it is undisputed that Atkinson led a group of approximately 15 to 20 employees into Schnell's office on January 19. According to Union delegate Pemberton, the employees closed the door after they entered. By confronting Schnell the way he did, in her office, Atkinson intended to intimidate and threaten the diminutive Schnell, who was alone, in front of the other employees in a demonstration of force and power. When Schnell insisted on having another manager present, the employees left, and Atkinson refused to discuss their concerns in the public hallway, or continue the "walk-in" in Schnell's office with a witness present. Thus, under the circumstances here, the location Atkinson chose to confront Schnell weighs against protection of the conduct.

**2. The Subject Matter Of The Discussion Is A Neutral Factor.**

There is no dispute that Atkinson went to Schnell's office to complain about conditions in the workplace. Atkinson testified that he told Schnell that the employees

had lost confidence in her leadership and wanted to meet with corporate to address ongoing issues. Schnell told Condon that Atkinson stated that “people were sick and tired of her lies, that she was a cheat, and she was mismanaging, and was bad leadership in the building.” (Tr. Vol. IV at 604:25–605:3). The other employee witnesses gave inconsistent testimony. Some recalled that Atkinson generally stated they were there to present concerns and let Schnell know they were being treated unfairly, while others did not remember Atkinson speaking at all. The testimony was consistent, however, that Atkinson never gave Schnell any specific examples or explanations of the alleged lies or the management decisions, poor leadership, or unfair treatment that needed to be changed. Thus, it is clear that the employees were not there to ask Schnell to *address* or discuss any specific grievance or issue, but, rather, as Atkinson’s verbal comments showed, to berate and castigate her. Again, this is supported by testimony that after Schnell insisted on having another manager present, Atkinson refused to further discuss any employee concerns. In these circumstances, therefore, the subject matter of the discussion is a neutral factor that does not favor protection under the Act.

### **3. The Nature Of Atkinson’s Outburst Weighs Against Protection.**

The undisputed testimony is that Schnell was alone in her office, seated behind her desk, and surrounded by 15 to 20 employees (who closed the door behind them) when Atkinson began speaking loudly enough for all employees to hear him. (Tr. Vol. II at 331:22–332:9). Furthermore, it is undisputed that Schnell told the employees that she felt uncomfortable and wanted to get another manager in the office to continue the discussion. (Tr. Vol. II at 417:7–417:11; Tr. Vol. III at 501:3–501:9, 514:11–514:12,

528:2–528:6, 537:6–537:21, 550:24–551:10, 554:25–555:7). Schnell counted the number of employees in her office, but when she tried to leave, Atkinson began slapping his closed fist into his hand. (Tr. Vol. II at 416:11–416:17; Tr. Vol. III at 501:3–501:5, 512:7–512:10, 514:11–514:12, 520:19–521:12, 528:2–528:11, 537:22–538:10, 550:24–551:10, 554:25–555:7). Recognizing that Schnell was intimidated, other employees explained that they did not intend to be violent and that Schnell should be allowed to get someone. (Tr. Vol. II at 416:20–417:3; Tr. Vol. III at 514:13–514:21, 528:7–528:25, 541:4–541:9). Condon testified that when Schnell returned to her office, Atkinson warned her to “watch out.” (Tr. Vol. IV at 606:1–606:4). Like any other person in this situation reasonably would have been, Schnell clearly was intimidated.

The only factual dispute is the nature of Atkinson’s hand gestures. Schnell told Condon that Atkinson pounded his fist into his hand. At trial, Atkinson admitted that he had a habit of pounding his fingers into his other hand<sup>20</sup> and that he was doing that when he was in Schnell’s office. (Tr. Vol. II at 300:8–300:23). According to Atkinson, his hands were open when he made those motions, but that cannot be correct because he also testified that he was holding the grievance in one hand while in Schnell’s office. (Tr. Vol. II at 297:8–297:18). Thus, one of his hands had to have been closed around the grievance, so as Atkinson moved his hands as he described, the grievance was in the hand that was slapping his open palm. Atkinson’s fist (with the grievance inside) was being pounded into his open palm, just as Schnell described. Moreover, Lecky testified that Atkinson moved forward to hand Schnell the grievance, a gesture that

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<sup>20</sup> Atkinson demonstrated this movement at trial by slapping the back of one hand into the open palm of his other hand.

Schnell could have perceived as Atkinson blocking her path to the door. (Tr. Vol. III at 528:2–528:3).

For all of the above reasons, the nature of Atkinson's conduct weighs against protection. *See Starbucks*, 345 NLRB at 878 (finding that an executive that was followed at night by a group of people, including employees, that were shouting and taunting him, reasonably would have been intimidated).

**4. Schnell's Conduct Did Not Provoke Atkinson's Outburst, Weighing Against Protection.**

The fourth factor weighs against protection because there was no evidence that Schnell provoked Atkinson's misconduct. First, there is no testimony or other evidence that the "walk-in" was prompted by, or in response to, alleged unfair labor practices committed by Schnell. Second, there was no evidence that Schnell did anything at all in her office to provoke Atkinson's misconduct. The facts here are analogous to those in *Tru Joist MacMillian*, 341 NLRB at 372. There, a discharged employee, angered by his employer's unfair labor practice, "orchestrated a confrontational face-to-face meeting on a date of his own choosing." Because of the employee's conduct, the fourth factor did not weight in his favor. *See also Starbucks Corp.*, 354 NLRB at 878 (although there were other unfair labor practices, none were directed at the discharged employee, and the most recent unfair labor practice occurred two months earlier; nor did the employee spontaneously react to a stressful situation). Even assuming Atkinson went to Schnell's office to dispute an alleged unfair labor practice, he did so deliberately and in an orchestrated manner to intimidate and threaten Schnell. Thus, Atkinson's misconduct was not provoked in any way by Schnell's conduct in her office or by any alleged unfair labor practice. This factor, therefore weighs against protection under the Act.

The record clearly establishes that Long Ridge terminated Atkinson because he engaged in verbally abusive and physically threatening behavior toward Schell on January 19. Atkinson's conduct was in violation of the Center's Professional Conduct/Courtesy and Workplace Violence Policies. Although Atkinson was engaging in a "walk-in," that conduct lost its protection because the location of the "walk-in," the nature of Atkinson's outburst, and lack of provocation by Schnell all weighed against protection under the *Atlantic Steel* analysis, while the subject matter of the discussion was neutral. Thus, the ALJ erred by finding to the contrary.

Because the ALJ failed to consider Schnell's statement to Condon about what happened during the "walk-in" and further failed to analyze appropriately all of the *Atlantic Steel* factors considering the undisputed testimony of other witnesses, he erroneously determined that Respondents violated Sections 8(a)(1) and (3) when Long Ridge terminated Atkinson. As explained above, however, the proper application and analysis of the *Atlantic Steel* factors demand the conclusion that Atkinson's conduct during the "walk-in" lost any protection under the Act, and, therefore, Long Ridge lawfully discharged Atkinson.

## V. CONCLUSION

For all of the reasons set forth above, the ALJ's determination that Respondents violated Sections 8(a)(1) and (3) of the Act by terminating Atkinson is erroneous. Accordingly, the Board should reverse the ALJ's findings and conclusions in that regard and dismiss the Complaint in its entirety.<sup>21</sup>

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<sup>21</sup> As correctly found by the ALJ in his Decision, Respondents did not discharge Williams in violation of the Act, and that determination should not be disturbed.

Respectfully submitted,

A handwritten signature in blue ink, reading "George W. Loveland, II", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that copies of Respondents' Brief in Support of Respondents' Exceptions to Administrative Law Judge's Decision were served on December 10, 2013, in the manner set forth below:

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